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No. 89

In the Supreme Court of the United States

OCTOBER TERM, 1936

ERNEST O. THOMPSON, C. V. TERRELL AND LON A. SMITH, COMPOSING THE RAILROAD COMMISSION OF TEXAS, ET AL., APPELLANTS,

VERSUS

CONSOLIDATED GAS UTILITIES CORPORATION AND TEXOMA NATURAL GAS COMPANY, APPELLEES.

Appeal From the District Court of the United States for the Western District of Texas.

BRIEF FOR THE APPELLANTS

ELLIOTT PRINTING CO.—*Austin*

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AND

TEXOMA NATURAL GAS COMPANY, APPELLEES.

Appeal From the District Court of the United States for the Western District of Texas.

BRIEF FOR THE APPELLANTS

OPINIONS BELOW

The opinion of the District Court for the Western District of Texas granting an interlocutory injunction to the Texas Panhandle Gas Company, the predecessor of Consolidated Gas Utilities Corporation, is reported in 12 Fed. Supp. 462 under the style of Texas Panhandle Gas Company versus Thompson et al. (R. 131-140). The opinion of the same court on the ap-

plication of Texoma Natural Gas Company for an interlocutory injunction is not reported, but is set out in full on page 140 of the Record. The opinion of the court granting permanent injunctions to both appellees is reported in 14 Fed. Supp. 318. (R.141-162.)

JURISDICTION

In accordance with paragraph one of Rule 12, statement was duly filed disclosing the grounds upon which jurisdiction of this court was invoked. The final decrees sought to be reviewed were entered on the 26th day of April, 1936, and the 30th day of April, 1936, respectively. (R. 162-167). Petition for allowance of appeal and order allowing appeal, together with assignment of errors were filed May 8, 1936. (R. 190-201). Statement as to jurisdiction and the transcript of record were filed in this court May 28, 1936, and an order was entered in this court June 1, 1936, noting probable jurisdiction. The jurisdiction of this court rests on Section 266 of the Judicial Code as amended (Title 28, Section 380, U.S.C.A.) and Section 238 of the Judicial Code as amended (Title 28, Section 345, U.S.C.A.).

QUESTIONS PRESENTED

(1) Whether, irrespective of the existence of underground waste, the Legislature of Texas can constitutionally provide for the regulation of the production of natural gas to prevent disproportionate and excessive withdrawals on the part of any producer, thereby protecting and adjusting the correlative rights of the various owners of a common gas reservoir.

(2) Whether the Legislature of Texas has passed such a statute.

(3) Whether the orders of the Railroad Commission of Texas which restrict the total daily production of sweet natural gas from the Panhandle gas field to the daily market demand for same are valid as waste prevention measures.

STATUTE INVOLVED

The statute of the State of Texas, the validity of which is involved, is Acts 1935, 44th Legislature, Regular Session, Chapter 120, page 318, Article 6008, Vernon's Annotated Revised Civil Statutes of Texas. Revision of 1925, as amended, which statute is commonly referred to as House Bill No. 266. The provisions of the statute are set forth in Appendix "A" of this Brief.

STATEMENT OF THE CASE

These two cases, consolidated for the purpose of appeal, alike concern the right of the State of Texas to prorate production of gas in this State under the provisions of House Bill No. 266, and particularly those portions of the Act and the orders of the Railroad Commission issued in execution of such provisions relating to ratable production of gas in the Panhandle field of Texas. On the merits the two cases were tried concurrently and a single opinion written, in which it was held that permanent injunctions should issue against the appellants in favor of each of the appellees permanently enjoining operation of the orders. (R. 141-162). For convenience the Act will be referred to as House Bill No. 266.

House Bill No. 266 amends Article 6008 of the Revised Civil Statutes, which is the statute particularly dealing with the production and use of natural gas. Article 6008, as it existed prior to 1931, is set out in Appendix "B" of this Brief. This statute was amended in 1931 (Acts 1931, 42nd Legislature, First Called Session, Chap. 26, p. 46), and is set out in Appendix "C" of this Brief. Article 6008 was again amended in 1933 by the passage of the so-called "sour gas law" (Acts 1933, 43rd Legislature, Regular Session, Chap. 100, p. 222; Acts 1933, 43rd Legislature, First Called Session, Chap. 88, p. 229), which statute is set out in Appendix "D". The law set out in Appendix "D" continued in force until the effective date of House Bill No. 266, which was August 1, 1935.

Section 59 of Article 16 of the Constitution of Texas, which section was adopted at an election held on August 21, 1917, and recognized by proclamation under date of October 2, 1917, provides in part as follows:

> "The conservation and development of all the natural resources of this State * * * and the preservation and conservation of such natural resources of this State are each and all hereby declared public rights and duties; and the Legislature shall pass all such laws as may be appropriate thereto. * * *"

Texas Panhandle Gas Company and Texoma Natural Gas Company, both Delaware corporations operating as gas producing companies in the State of Texas under permits, filed their separate suits against Ernest O. Thompson, C. V. Terrell and Lon A. Smith, as members of the Railroad Commission of

Texas, and against William McCraw, as Attorney General of Texas, all citizens of Texas, seeking to enjoin the defendants, appellants herein, from enforcing House Bill No. 266 and the orders of the Railroad Commission issued in pursuance to the sections of said Act providing for ratable production. These orders sought to limit the production of sweet natural gas in the Panhandle gas field of Texas, including production from wells owned by appellees, to the market demand for such gas as found by the Commission and allocated such total field allowable among all the sweet gas wells in the field.

Appellees attacked the validity of the Act and the orders of the Commission, and prayed for interlocutory injunctions pending trial on the merits. In accordance with Judicial Code, Section 266, as amended, District Judge Robert J. McMillan called to his assistance two other Judges, Judge Joseph C. Hutcheson, Jr., Circuit Judge of the Fifth Circuit, and Judge Thomas M. Kennerly, District Judge for the Southern District of Texas, and on August 31, 1935, hearing was had before the three-judge court so constituted on the application of the Texas Panhandle Gas Company for an interlocutory injunction. The appellants contested the same, having answered fully. The court entered a decree granting to the Texas Panhandle Gas Company an interlocutory injunction restraining the enforcement of the orders as to it; and, subsequently, on September 19, 1935, the same court heard the application of Texoma Natural Gas Company and granted its application for an interlocutory injunction

against the operation of the orders of the Commission. (R. 131-140).

Thereafter, the Consolidated Gas Utilities Corporation was substituted as a party complainant in place of Texas Panhandle Gas Company upon proper showing that such company had succeeded to all the rights, assets and property of Texas Panhandle Gas Company. (R. 42).

In accordance with the provisions of House Bill No. 266 the Railroad Commission of Texas continued to promulgate orders fixing the allowable production from the Panhandle and other gas fields of Texas, and on December 10, 1935, promulgated what it termed a base order. (R. 476-496). By amended pleadings, the appellees attacked the orders of the Railroad Commission of December 10, and of December 18, 1935, and asserted the invalidity of House Bill No. 266, alleging that the statute and orders were violative of their rights under the Federal and State Constitutions. On the merits the two cases were heard together before the same three-judge court. In due course the court entered decrees for the appellees enjoining the enforcement of the orders as to them, stating in its joint opinion in both cases that the statute in question, contrary to the contention of appellants, does not attempt to authorize proration of production except in connection with and to prevent waste; that if the statute were construed to provide for proration of production without regard to the existence of waste, then the statute would be on its face a class law, unjust and partial. That "the proof tended to, if it did not wholly overthrow the claim that the order was a real

waste order looking toward and having a reasonable relation to waste prevention," but to appellees the orders had the purpose and result of expropriating their property and forcibly giving it to the use of others. The court rejected the claim of the appellants that the orders must be sustained as waste measures, and found instead that they were merely orders enacted to bring about the compulsory purchase of gas by the appellees on the theory of protecting correlative rights. The court definitely rejected the contention of the appellants that the proper construction of the statute was that it authorized proration of gas production to protect correlative rights as well as to prevent waste, and held that if the Act be susceptible of that construction it would be unconstitutional. (R. 151-162).

The appellees tried the case substantially on the following theories and the obvious ramifications and extensions thereof:

Appellees have each acquired and now hold gas producing lands or reserves in the Panhandle gas field, the production from such wells and properties being marketed by them under sales contracts entered into with affiliated pipe line companies. The operation of their wells and properties do not and would not create waste, and the use to which they put the production from their wells is a non-wasteful use, and the operation and effect of the statute and orders, by restricting the amount of gas to be produced in the entire field to market demand, and allocating such market demand among all producers in the field, required the appellees to purchase gas from others in order to supply their market outlets, and thus dedicated

their private pipe lines, markets and property to the use of such others without compensation, contrary to the 14th Amendment of the Federal Constitution. The enforcement of the statute and orders would prevent appellees from fulfilling their contracts for the sale of gas, would unreasonably interfere with interstate commerce, would deprive them of their property without due process of law and deny them equal protection of the law. That House Bill No. 266 was void and unenforceable, in so far as it related to ratable production, because it unlawfully delegated legislative and judicial power to the Railroad Commission, contrary to the Texas Constitution. That the provisions of such statute are too vague, indefinite and uncertain to furnish and afford a sufficient standard of conduct or rule for the guidance of the Railroad Commission in carrying out its provisions. That the real and underlying purpose of the Legislature in enacting House Bill No. 266 was to compel appellees to share their market and pipe line facilities with others having no markets or facilities, and force appellees to purchase gas from others.

The appellants defended substantially on the following theories and the obvious ramifications and extensions thereof:

The Panhandle gas field is a common pool or reservoir, so that the production and operation with respect to any well in the field has an effect on other owners of the common reservoir, and upon the ultimate recovery of gas. Prior to the enactment of House Bill No. 266 disproportionate and unequal production was rife in the field, and, in addition, enormous

waste was taking place in the production and use of natural gas which included the wasting into the air of approximately one billion cubic feet of natural gas per day. House Bill No. 266, properly construed, had a twofold purpose: first, to prevent waste, both underground and overground, in the production and use of natural gas; and, second, to provide for the regulation of production of gas from the common reservoir so as to prevent disproportionate and unequal withdrawals on the part of any operator, thereby protecting and adjusting the correlative rights of all the owners of such reservoir. The delegation of authority to the Railroad Commission to promulgate orders to effectuate each of these purposes exists with no dependence one on the other. The orders of the Railroad Commission providing for the restriction of the production of gas from the Panhandle gas field to the daily reasonable market demand therefor will result in a uniform and ratable system of production in such reservoir, and in the ultimate recovery of tremendous quantities of gas which would otherwise not be produced, and thus the orders should be sustained as waste prevention measures. Even if the orders be not sustainable as waste prevention measures, the statutes and orders constitute a valid exercise of the police power in the protection and adjustment of the correlative rights of the several owners of the Panhandle gas field.

The practical effect of House Bill No. 266 is to restrict the use of sweet gas (as distinguished from "sour" or sulphur gas) to light and fuel purposes. The outlet or market for sweet gas for such purposes in the Panhandle gas field is controlled entirely by integrated pipe line producers, such as appellees. In the

absence of a system of ratable production, such as is provided for by House Bill No. 266, and set up by the orders of the Commission, the pipe line producers, controlling the only outlet for lawful purposes, could and would produce all of the sweet gas produced from said reservoir from their own wells, although at least 20% of the reservoir, amounting to some 200,000 acres, is owned by others. House Bill No. 266, in providing for the restriction of the total production of sweet gas to the daily market demand therefor, and in providing for the allocation of said allowable production among all producers in said common reservoir, prevents disproportionate and unequal production on the part of any producer or operator to the detriment of others who also own an interest in the common fund. Thus the case made by appellants showed: first, that the operation of the statute and orders in requiring uniform and ratable production will prevent waste; and, second, that they are a valid exercise of the police power since they operate for the protection and adjustment of the correlative rights of the various owners of common gas reservoirs in Texas.

The trial court definitely rejected the contention of the appellants that the statute considered as a whole was one designed to protect correlative rights as well as to prevent waste, and, holding that the orders in question were promulgated solely to bring about compulsory purchase and the sharing of distant markets of appellees and other pipe line producers and not as waste measures, struck the orders down. The opinion (R. 141-162) was written by Judge Joseph C. Hutcheson, Jr. Findings of fact and conclusions of

law were subsequently filed under Equity Rule 70 1/2 (R. 167-189).

In view of the holding of the trial court that the statute does not authorize the regulation of appellees' production on the theory of correlative rights, and because of its view that no waste was shown and hence there was no right to regulate their production on the theory of waste, the court did not consider or decide subordinate questions raised by appellees.

SPECIFICATION OF ERRORS TO BE URGED

The District Court erred:

(1) In holding that House Bill No. 266 does not authorize the Railroad Commission to restrict the daily production from all sweet gas wells in the Panhandle field, a common reservoir, except for the purpose of preventing underground waste.

(2) In holding that if House Bill No. 266 be not construed solely as a waste statute it must be construed as a statute unlawfully delegating to the Railroad Commission legislative and judicial powers in violation of Section 1, Article II of the Texas Constitution.

(3) In holding that the statute and the orders issued in pursuance thereto operate to confiscate appellees' property in violation of the Fourteenth Amendment to the Federal Constitution.

(4) In holding that the orders of the Railroad Commission have no reasonable relation to the prevention of underground waste as defined by House Bill No. 266, and no reasonable relation to securing a

greater ultimate recovery of gas from the gas fields of Texas.

(5) In failing to hold that House Bill No. 266 vests in the Railroad Commission the power to restrict gas production in common reservoirs in Texas to market demand for the protection of the correlative rights of all owners in such reservoirs irrespective of the existence or imminence of waste absent such restriction.

(6) In failing to hold that in the light of the history of and the conditions existing in the gas fields of Texas, and the public interest in their conservation and development, particularly in the Panhandle field, House Bill No. 266 is a legitimate exercise of the legislative power, and bears a reasonable relation to

(a) the prevention of waste, and

(b) the protection of correlative rights in common reservoirs.

SUMMARY OF THE ARGUMENT

Legislative authority for the enactment of House Bill No. 266 is grounded upon the police power inherent in the Texas Legislature, and also upon the provision of the Texas Constitution which expressly directs the Legislature to pass all such laws as may be appropriate to the conservation and development of all the natural resources of the State.

The regulation of gas production under House Bill No. 266, enacted in accordance with such powers, is reasonably calculated (1) to conserve and develop the natural resources of the State, and (2) to adjust and

protect the correlative rights of all interested in such resources. It seeks to protect both public and private rights therein. The express and unambiguous language of the statute, a comparison of such Act with contemporaneous legislation, the legislative history of the Act, its terms and provisions, and the evils sought to be remedied by its enactment, establish conclusively the legislative intent that the statute is not addressed solely to the prevention of waste. In clear and unmistakable language the Act directs the Railroad Commission to prorate and regulate the daily gas well production from each common gas reservoir in the protection and adjustment of the correlative rights and opportunities of each owner of gas in such common reservoirs to produce and use or sell such gas.

In the enactment of the statute the Legislature sought to remedy two outstanding evils existent in the gas fields of Texas, particularly in the Panhandle field. These two evils were: (1) utilization of gas for inferior purposes with consequent physical and economic waste; and (2) disproportionate and unequal production and use from common gas reservoirs. In remedying such evils the Legislature was empowered to employ all legitimate means having a reasonable relation to the accomplishment of the ends sought.

Legislative power to enact a statute having for its purpose the adjustment and protection of the correlative rights of owners in a common property must be conceded. The State may consider the relation of rights and accommodate their coexistence and in the interest of all may limit one that others may be enjoyed. This power has been exerted in the prevention of physical

and economic waste of a common fund, in the adjustment of the rights of owners in a common property, irrespective of waste, and in the adjustment of the rights of common owners whose interests conflict, by the enactment of regulations for their mutual protection, and to bring about orderly enjoyment of property and rights therein. Its basis is the doctrine of *sic utere*. It is here addressed to the evils occasioned by the opportunity for one producer to produce an undue proportion of gas from a common reservoir to the detriment of others also owning an interest in such reservoir. It is here manifested for the purpose of securing a just distribution to arise from the common enjoyment by common owners of the rights to reduce gas to possession.

That the Legislature has not exhausted its power in this direction, that it has not gone to the limit of legislative discretion, constitutes no objection to the exercise of the power actually exerted. That the Legislature did not vest in the Railroad Commission the power to partition gas in place, or to consider probable productive but undrilled gas lands in fixing well allowables does not render the statute any less a statute designed to effect the protection and adjustment of coequal or correlative rights. As it does result in the protection and adjustment of such rights it must be upheld.

The Act does not unlawfully delegate legislative or judicial power to the Railroad Commission. It cannot be construed to vest in the Railroad Commission the power to ascertain and partition the rights of owners in common gas reservoirs in Texas, nor to vest in the

Commission the right to declare the legislative policy. It defines when, how, and under what conditions restrictions are to be imposed, designates the limits of such restrictions, and prescribes the course the Commission shall pursue in discharging its duties. The Commission, a body of experts, is left free only to fill in the necessary details. In respect to the separation of governmental powers the provisions of the Texas Constitution are not different from like provisions in the constitutions of practically all the states of the Union. The Commission is directed to ascertain the reasonable market demand for gas, to restrict production to an amount which can be produced without waste, but, in all events, to restrict the production to the amount of market demand; and, as directed, to allocate the total allowable production among all wells in the field on a reasonable basis, taking into account the size of the tracts on which the wells are located up to the efficient drainage area, and also taking into account the relative potentials of such wells. The discretion of the Commission is circumscribed within definite and legitimate bounds. In any event, the issue of improper delegation of authority is immaterial since the Act is not susceptible of the construction that it undertakes to authorize the Railroad Commission to partition natural gas in place.

The tremendous problems encountered in the Panhandle gas field would afford the basis for the exercise of powers far exceeding those exercised in House Bill No. 266. These problems are unrivalled in scope and complexity, and present for legislative solution the divergent interests of a multitude of land and royalty

owners, leaseholders and operators each asserting interests in oil, gas (sweet and sour), and casinghead gas, all encountered in a common reservoir. Millions of consumers are dependent upon such field for their gas supply, and are concerned with its orderly operation and development. No other problem of public interest was given such careful and serious consideration by the Texas Legislature. Its conclusion that no real or permanent solution could be found for the problems of the Panhandle field that did not include a plan of ratable production is the same conclusion reached by all others, interested or disinterested, who have given study to the problem. A problem so complicated, so replete with warring interests, requires latitude in its solution, and necessary adjustments on the part of all concerned.

The benefits to be reaped by appellees through the enactment of House Bill No. 266 far outweigh any detriments to which they may be subjected. Their reserves are protected from losses through production of tremendous quantities of gas for inferior uses, the lives of such reserves are extended for many years; orderly operation and development of the field are assured. Appellees are not in a position to complain while others are virtually denied the use of their property in order that the property of the appellees may be protected. Their advantages in the scheme of protection are far greater than any disadvantages they may suffer.

House Bill No. 266 and the orders issued pursuant thereto bear a reasonable relation to the prevention of waste. The testimony in this cause establishes that ratable production will prevent underground waste by

preventing the irregular encroachment of water, the channeling and coning of water into gas formations, and the entrapment of such gas. The testimony is undisputed that ratable production will result in the conservation of gas, and the recovery of large amounts of gas that would be otherwise unrecovered from the reservoir. The discretion exercised by the Legislature and the Commission should not be weighed in the judicial scales to determine whether their enactments or orders are the wisest or the best solution for the problem. The solemn and deliberate judgment of the Legislature expressed in the statute should not be overthrown by reason of diverse opinions as to the wisdom or efficacy of the legislation. In this aspect, the courts will not substitute their judgment for the judgment of the Legislature.

The courts should not be concerned with possible hidden purposes or motives of the Legislature or of the Commission, nor with the question of whether the appellees are guilty or innocent of the practices of disproportionate and unratable production and of underground waste against which the statute is directed, or the degree of their culpability. If the evil justifies legislative treatment, the validity of the remedy to be applied to the entire condition is not effected by the particular situation of one or more individuals.

There is no attempt here by the Legislature or the Commission to exercise powers violative of the Fourteenth Amendment or the Commerce Clause of the Federal Constitution. Appellees' right to produce gas is solely by virtue of their ownership of gas lands, and not by virtue of their affiliations with pipe line com-

panies, or their control of markets. The Act is concerned only with the mining operation of gas production, a local matter over which the State of Texas has full power to exercise its authority. There is no interference with any other operations. Any indirect effect of the Act or of the orders is unobjectionable, because such effect is an unavoidable result of the exercise by the Texas Legislature of its inherent powers of sovereignty.

ARGUMENT

I.

The Texas gas statute requires the restriction of the daily production from all sweet gas wells in a common reservoir to the daily market demand for such gas, regardless of the existence of underground waste.

Appellants contend that the trial court ignored the plain and unambiguous language of the statute in holding that House Bill No. 266 is simply a waste statute, and that it does not authorize or require the Railroad Commission of Texas to promulgate orders restricting the total production from all wells in the gas fields of Texas, except in the prevention of waste as defined by the Act. (R. 183). It is appellants' contention that the construction which the trial court placed on the statute is not only incorrect, but that in its conclusion the trial court necessarily ignored the express terms of the statute. (R. 195).

1. The problem before the Legislature.

Before entering into a discussion of the language of the Act it is necessary to understand the problems be-

fore the Legislature. Knowing the problems, the remedies intended to be supplied, we believe, are apparent.

As shown by the statement in the Railroad Commission's order (R. 476-481) depicting the conditions in the Panhandle field which existed before, and at the time of, the enactment of House Bill No. 266 in 1935, found by the trial court to be substantially correct (R. 142), there were two principal evils with which the people of Texas and the Legislature were concerned when this law was under consideration. The first evil was that of using sweet gas for inferior or wasteful purposes. This evil had arisen on account of the enactment of the so-called "Sour Gas Law" by the 43rd Legislature of Texas in 1933, which permitted gas producers in the Panhandle field, who had no light and fuel market for their gas, to process or "strip" by the compression or absorption method dry gas[1] of its natural gasoline contents, and to allow the residue gas to escape into the air. This operation resulted in the recovery of only three per cent of the heat value of the gas while ninety-seven per cent of the heat value was dissipated. Under the provision of this same law, the operators could, and did, use sweet gas for the manufacture of carbon black. By these operations dry sweet gas was subjected to inferior uses when the public interest demanded that such gas be preserved for uses socially more desirable, such as for heat and light

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[1]Dry gas is gas produced from gas wells. Wet gas or casinghead gas is gas produced with oil. See **Reynolds v. McMan Oil & Gas Company**, 11 S.W.(2d) 778 for a discussion of casinghead gas.

purposes. The "Sour Gas Law" is set out in full in Appendix "D" of this Brief.

The second principal evil which confronted the Legislature of Texas was the evil of disproportionate and unequal production on the part of certain producers in the gas fields of Texas, especially in the Panhandle field, a common reservoir. This was an evil which had concerned the people of Texas and their administrative and legislative bodies since the Panhandle gas field became a major factor in the production of gas in the United States. (See footnote 3 to trial court's opinion, R. 142-149). From 1931 to 1933 the only persons who were able to produce any gas from the sweet gas portions of the Panhandle field were the pipe line companies, and those who had connections with the pipe line companies. The result of this situation was that the pipe line companies could and did withdraw from the common reservoir all the gas needed for their market requirements, while their less fortunate neighbors, likewise the owners of sweet gas producing lands and wells, were forced to sit helplessly by and see their gas drained away into pipe line company wells, resulting in pressure declines of considerable magnitude.

It seemed clear that if the conditions existing in the Panhandle gas field (a typical situation) were allowed to continue all of the gas which was produced from this field through sweet gas wells would be produced through the wells of the pipe line companies down to the exhaustion of the field, and that other landowners and operators, owners of twenty per cent of the sweet gas acreage in the field, would never be able to produce

any of the gas in the common reservoir or to realize anything on their property.

The Legislature by statutes, and the Railroad Commission by orders sought to remedy these evils brought about by the practices of the pipe line companies. However, each effort was stopped by injunctive process of a Federal Court, so that for several years the routine was: a change in statute, a new regulation of gas production thereunder, a new attack by the pipe line companies, a new decree restraining enforcement.[1]

When these various solutions proved unavailing by virtue of Federal Court injunctions, the 43rd Legislature of Texas (1933) passed what is known as the "Sour Gas Law."[2] Under the terms of such law, any producer in the Panhandle field who had no market for light and fuel purposes could use his gas for any beneficial purpose, including the manufacture of natural gasoline. As a result, many carbon-black plants

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[1](a) Acts 1931, 42nd Legislature, 1st Called Session, Ch. 28. This is the statute involved in **Texoma Natural Gas Co. v. Railroad Commission**, 59 Fed. (2d) 750.
(b) **Texoma Natural Gas Co. v. Terrell**, 2 Fed. Supp. 168. This case involved an order of the Railroad Commission.
(c) Acts 1932, 42nd Legislature, 4th Called Session, Ch. 2. This is the statute involved in **Canadian River Gas Company v. Terrell**, 4 Fed. Supp. 222.

[2]Acts 1933, 43rd Legislature, Regular Session, Ch. 100; Acts 1933, 43rd Legislature, 1st Called Session, Ch. 88, quoted in Appendix "D".

As originally introduced this Act only related to sour gas, or gas with sulphur content and unfit for light and domestic fuel purposes, hence it was termed the "Sour Gas Law". It was amended before final passage to include sweet gas.

were erected in the sweet gas portions of the Panhandle field, and many stripping plants were constructed to extract the natural gasoline content of the gas. By the erection of these plants many of the producers who had theretofore been unable to produce or market any gas from their wells were afforded an opportunity to produce gas and to sell the same.

Under existing regulations, it was lawful for any gas well to be produced up to twenty-five per cent of its capacity to produce. Those who in 1933 and 1934 produced gas from their sweet gas wells and sold same to the carbon black and stripping plants were able, on account of the nature of the demand for same, to produce a much larger quantity of gas from their wells than were most of the pipe line companies who were producing their gas only for light and fuel purposes. This condition existed on account of the comparatively limited nature of the demand for gas for light and fuel purposes. The final result of the change in policy, authorizing production for purposes other than light and fuel, was a new condition of disproportionate and unequal withdrawals from the common reservoir. For the first time the amount of production was in favor of the producers connected to the carbon black and stripping plants, and against the pipe line companies. Once more the pipe line companies attacked the law, this time unsuccessfully. *Sneed v. Phillips Petroleum Company*, 76 Fed. (2d) 785.[1] It was

[1]The record shows that this litigation was financed by Texoma Natural Gas Company, although for reasons satisfactory to it, others took the front as nominal plaintiffs. (R. 378).

clear, nevertheless, that a continuation of the use of sweet gas for carbon black and stripping, could be neither a sound nor permanent solution of these fundamental problems, though it was, apparently, a solution which would meet constitutional tests. No restriction at all on production or use, regardless of waste, would be within legislative powers.

While the 1933 Act authorized production for new purposes, and accorded an opportunity to produce to those without pipe line connections, there were many producers in the field, owning sweet gas producing lands and wells, who were not connected either to the carbon black or stripping plants, or to the lines of the pipe line companies. These persons continued to be in a situation similar to that of all of the non-pipe line producers before the passage of the sour gas law. In other words, they were totally without an opportunity to produce any gas from their lands, or to protect themselves against the drainage to which they were being subjected by wells connected to pipe lines, and wells connected to stripping and carbon black plants.

The first evil, therefore, which confronted the 44th Legislature of Texas (1935) was an evil which was brought about by the enactment of the "Sour Gas Law." It was an evil growing out of the enormous quantities of residue gas which the stripping plants were lawfully allowing to escape into the open air after the natural gasoline content of the gas had been extracted, and also the evil arising from the relatively inferior use to which sweet gas was being put in the manufacture of carbon black, all to the detriment of the public at large, which was concerned with the

preservation of the gas of this enormous gas reservoir for the most beneficial uses.

The legislative remedy for the evil of overground waste was comparatively simple. All that was needed was the enactment of a law which restricted sweet gas to light and fuel uses, forbidding its use for the manufacture of carbon black, and which prohibited the escape into the open air of gas before or after its natural gasoline content had been extracted. Such a solution did not require the aid or assistance of any State administrative body, such as would be involved in fixing the total allowable of gas from the field, or in allocating the allowable gas among the various wells in the field. Such a law, in so far as it undertook to reach the evil of waste incident to stripping operations and the use of sweet gas for carbon black purposes, would be entirely self-executing. All that the Legislature had to do in remedying these matters was to prohibit them. If the self-executing provisions of such a statute were violated the Attorney General of the state had his remedy in the way of penalty suits and injunctions. The Act of 1935 solved this phase of the problem in the direct and simple manner just outlined (Sec. 3 "J" & "K" Appendix "A."). This, however, reached only one of the existing evils.

The second principal evil, that of disproportionate and unequal withdrawals from the common gas reservoirs of Texas, could not be cured or minimized so easily or directly, for any proper solution required elaborate administrative machinery and supervision such as is found in House Bill No. 266. A large part of the Act, practically all of it beginning with Section

10, deals with the fundamental problems and the administrative machinery relating wholly to the evil of disproportionate and unequal withdrawals. These provisions would be surplusage and wholly out of place if it be true, as the trial court held, that the Legislature had in mind only the prevention of waste, and had no intention to provide for the adjustment and protection of the owners of the surface, regardless of waste.

2. **The language of the Act is plain in directing the Railroad Commission to restrict the total production of gas in any gas field to the reasonable market demand for such gas, irrespective of the existence of underground waste.**

Section 10 of the Act provides:

> "It shall be the duty of the Commission to prorate and regulate the daily gas well production from each common reservoir in the manner and method herein set forth. The Commission shall prorate and regulate such production for the protection of public and private interests:
>
> (a) In the prevention of waste as "waste" is defined herein.
>
> (b) In the adjustment of correlative rights and opportunities of each owner of gas in a common reservoir to produce and use or sell such gas as permitted in this Article."

Section 11 of the Act makes it entirely clear that the two matters mentioned in (a) and (b) above are independent of each other as grants of authority. This section reads:

> "The Commission shall exercise the authority to accomplish the purpose designated under item

(a) of Section 10 when the presence or imminence of waste is supported by a finding based upon the evidence introduced at a hearing to be held as herein provided.

"The Commission shall exercise the authority to accomplish the purpose designated under item (b) of Section 10 when evidence introduced at a hearing to be held as herein provided will support a finding made by the Commission that the aggregate lawful volume of the open flow or daily potential capacity to produce of all gas wells located in a common reservoir, is in excess of the daily reasonable market demand for gas from gas wells that may be produced from such common reservoir, to be utilized as permitted in this Article."

In other words, when the evidence produced before the Railroad Commission shows that waste is occurring in the production of gas, the Commission is instructed to restrict the production of gas so as to prevent the waste, and then to allocate the allowable production among all the wells in the field. This would not necessarily require limitation of production to market demand since an amount in excess of market demand might be produced without underground waste. The Commission is likewise directed, however, and this by an entirely independent grant of authority, and for the recited purpose of "adjustment of correlative rights and opportunities" to prorate the total production from any gas reservoir, regardless of the existence of underground waste as defined by the Act, whenever the total capacity to produce of all the wells in the field is in excess of the daily market demand for the gas. (Sec. 11).

Sections 12 and 13 define the method by which the Commission shall allocate the allowable production among the various wells in the field. Section 14 of the Act makes it entirely clear that the construction we are contending for is correct, if the matter were otherwise in doubt. It provides in part:

> "It shall be the duty of the Commission after notice and hearing to ascertain and determine the reasonable market demand for gas from gas wells to be used for light and fuel purposes and for all other lawful purposes to which sweet gas may be put under the terms of this Article and by proper order to restrict the production of gas from all gas wells in said field producing such gas to an amount equal to market demand or to an amount which may be produced without waste as otherwise defined; *provided, however, the production of such gas shall in any event be restricted to the amount of the reasonable market demand therefor.*" (Italics ours).

This section shows again the duofold character of the duties of the Commission, which are independent each of the other,

(a) with reference to entering orders to prevent the occurrence of underground waste in the production of gas, and

(b) in the promulgation of orders in the adjustment of the correlative rights and opportunities of the owners of gas in common reservoirs to produce, use or sell such gas.

Let us assume that the market demand for sweet gas from a common reservoir in Texas is five hundred million cubic feet a day, but that the evidence shows

that if more than three hundred million cubic feet per day are produced then underground waste of the character defined by the Act would result. In such case the Commission under Section 14 would clearly have the right to restrict the production from the field to three hundred million cubic feet per day to prevent the occurrence of the waste which would result if five hundred million cubic feet per day, the amount the market would absorb, were permitted to be produced. Suppose, however, that the figures are reversed, and that the evidence showed that the market demand for sweet gas from the field is three hundred million cubic feet per day, but that the field could produce as much as five hundred million cubic feet per day without underground waste. It then would be the duty of the Commission under Section 14 to restrict the total production from the field to three hundred million cubic feet per day in obedience to the plain mandate of the Statute, which reads:

> "Provided, however, the production of such gas shall *in any event* be restricted to the amount of the reasonable market demand therefor." (Italics ours).

It is plain, therefore, that the Commission has no discretion as to whether or not it will order the total production of gas from a common reservoir to be restricted to the daily market demand for such gas, regardless of whether such restriction is necessary to prevent the occurrence of underground waste. Waste or no waste, the Commission is required to restrict production to the reasonable market demand. The trial court held that the Act does not so provide, but only provides for such restriction to prevent waste. The

language of the Act negatives any intention to give regulatory power to the Commission solely to prevent waste. It is easy to understand why this is true, in view of the fact that the Legislature was vitally concerned with the evil of disproportionate and unequal withdrawals from the common gas reservoirs of Texas and was attempting to reach a satisfactory solution of same.

In the Panhandle field for example, the pipe line companies were the only operators who could produce sweet gas from that common reservoir for light and fuel purposes since they controlled the only market outlet. It is clear, of course, that the provisions of House Bill No. 266, which restricted sweet gas to light and fuel purposes, had the effect of dedicating the sweet gas producing portions of said field to the uses which were entirely controlled by the pipe line companies.[1] The trial court has so found. (R. 187). Un-

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[1]The record shows that all the potential markets within 900 miles of the Panhandle gas field are already supplied with natural gas (R. 363). Texoma Natural Gas Company pleaded that in 1929 and thereafter there was no market within 800 miles of said field. (R. 63-V).

Natural Gas Pipe Line Company of America, Texoma's affiliated company, spent $27,836 per mile to construct a 24 inch pipe line, this main line costing a total of $25,266,146 (**Final Report of Federal Trade Commission to Senate of the U. S.**, 1936, Document 92, Part 84-A, p. 311). Obviously even if all the potential markets were not already supplied with natural gas, it is beyond the financial ability of the average gas producer to construct a pipe line to carry his gas to such distant markets. He must either find an outlet for his gas in the field or not at all.

There is no demand for sweet gas for the other uses to which it may be put under Section 7 of the Act. (R. 327-328).

less some system were contemporaneously set up whereby the owners of lands comprising the twenty per cent of the sweet gas field which was not owned by the pipe line companies, would be protected in their right to enjoy the fruits of their ownership, such owners and operators would be subjected to the same system of disproportionate and unequal withdrawals on the part of the pipe line producers which had obtained prior to the passage of the sour gas law, and before 1933, and which also existed, but to the detriment of the pipe line companies, by the operation of the sour gas law. When the evil which confronted the Legislature is taken into account the intention of the Legislature is evident; and the language of the Act is entirely clear as being a proper, and perhaps the only, way to solve the whole problem.

3. **Other statutes existing at the time of the passage of House Bill No. 266 are ample to remedy the problem of underground waste.**

The conclusion that the lower court reached that House Bill No. 266 is solely a waste statute is an anomalous conclusion. It asserts that no restriction of production can be effected absent the presence or imminence of waste, and disregards the express provisions of the Act directing the Commission to restrict, *in any event*, the total production of gas in a common reservoir to the reasonable market demand therefor, and to allocate the allowable production among the various wells located therein. Practically all of the provisions of House Bill No. 266, defining underground waste in the production of gas and authorizing the Railroad Commission to promulgate orders to prevent

such waste, were already on the statute books of Texas, and have been for many years. In other words, the effect of the Court's construction is that the 44th Legislature of Texas held extended hearings, heard many witnesses, and finally enacted House Bill No. 266 as a simple duplicate of laws which were already in existence.

The conservation statutes of Texas[1] were amplified in 1931 (Acts 42nd Legislature, First Called Session, Ch. 26), which Act in considerable detail defined and prohibited waste in the production of natural gas or crude petroleum, and empowered the Railroad Commission to promulgate rules and regulations to carry the law into effect. This Act was amended by the 42nd Legislature, Fourth Called Session, Chapter 2, which became effective November 12, 1932. This last named Act provided that it should expire by its terms September 1, 1935; consequently, it was necessary for the 44th Legislature to reenact the oil and gas conservation statutes of Texas if they were to be continued. The 44th Legislature (1935), therefore, prior to the date of the enactment of House Bill No. 266, (which the trial court has held is simply a waste statute), did enact a comprehensive oil and gas conservation statute, said Act being Acts, 44th Legislature, Chapter 76, page 180, and is known as House Bill No. 782. This Act, for the most part, simply reenacted the oil and gas laws already in existence defining and prohibiting waste of gas as well as oil.

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[1]These statutes are reviewed in detail in **Danciger Oil & Refining Co. v. Railroad Commission**, 49 S.W. (2d) 837.

less some system were contemporaneously set up whereby the owners of lands comprising the twenty per cent of the sweet gas field which was not owned by the pipe line companies, would be protected in their right to enjoy the fruits of their ownership, such owners and operators would be subjected to the same system of disproportionate and unequal withdrawals on the part of the pipe line producers which had obtained prior to the passage of the sour gas law, and before 1933, and which also existed, but to the detriment of the pipe line companies, by the operation of the sour gas law. When the evil which confronted the Legislature is taken into account the intention of the Legislature is evident; and the language of the Act is entirely clear as being a proper, and perhaps the only, way to solve the whole problem.

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The conclusion that the lower court reached that House Bill No. 266 is solely a waste statute is an anomalous conclusion. It asserts that no restriction of production can be effected absent the presence or imminence of waste, and disregards the express provisions of the Act directing the Commission to restrict, *in any event*, the total production of gas in a common reservoir to the reasonable market demand therefor, and to allocate the allowable production among the various wells located therein. Practically all of the provisions of House Bill No. 266, defining underground waste in the production of gas and authorizing the Railroad Commission to promulgate orders to prevent

such waste, were already on the statute books of Texas, and have been for many years. In other words, the effect of the Court's construction is that the 44th Legislature of Texas held extended hearings, heard many witnesses, and finally enacted House Bill No. 266 as a simple duplicate of laws which were already in existence.

The conservation statutes of Texas[1] were amplified in 1931 (Acts 42nd Legislature, First Called Session, Ch. 26), which Act in considerable detail defined and prohibited waste in the production of natural gas or crude petroleum, and empowered the Railroad Commission to promulgate rules and regulations to carry the law into effect. This Act was amended by the 42nd Legislature, Fourth Called Session, Chapter 2, which became effective November 12, 1932. This last named Act provided that it should expire by its terms September 1, 1935; consequently, it was necessary for the 44th Legislature to reenact the oil and gas conservation statutes of Texas if they were to be continued. The 44th Legislature (1935), therefore, prior to the date of the enactment of House Bill No. 266, (which the trial court has held is simply a waste statute), did enact a comprehensive oil and gas conservation statute, said Act being Acts, 44th Legislature, Chapter 76, page 180, and is known as House Bill No. 782. This Act, for the most part, simply reenacted the oil and gas laws already in existence defining and prohibiting waste of gas as well as oil.

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[1]These statutes are reviewed in detail in **Danciger Oil & Refinjng Co. v. Railroad Commission**, 49 S.W. (2d) 837.

The provisions of House Bill No. 266 prohibiting underground waste in the production of gas, and the provisions delegating to the Railroad Commission the right to promulgate rules and regulations to prevent that evil, were simply copied from the general oil and gas conservation statute already passed by the 44th Legislature, as above mentioned. To show that this is true we set out below the pertinent portions of the two Acts so that a comparison may be made:

THE EXISTING LAW	HOUSE BILL NO. 266
"Sec. 2 * * * The production, storage, or transportation of crude petroleum oil or of natural gas in such manner, in such amount, or under such conditions as to constitute waste is hereby declared to be unlawful and is prohibited. The term 'waste' among other things shall specifically include:	"Sec. 3. The production, transportation, or use of natural gas in such manner, in such amount, or under such conditions as to constitute waste is hereby declared to be unlawful and is prohibited. The term 'waste' among other things shall specifically include:
(a) The operation of any oil well or wells with an inefficient gas oil ratio, and the Commission is hereby given authority to fix and determine by order such ratio: provided that the utilization for manufacture of natural gasoline of gas produced from an oil well within the permitted gas-oil ratio shall not be included within the definition of waste.	(a) The operation of any oil well, or wells with an inefficient gas-oil ratio.

(b) The drowning with water of any stratum or part thereof capable of producing oil or gas, or both oil and gas, in paying quantities.

(c) Underground waste or loss however caused and whether or not defined in other subdivisions hereof.

(d) Permitting any natural gas well to burn wastefully.

(e) The creation of unnecessary fire hazards.

(f) Physical waste or loss incident to, or resulting from, so drilling, equipping, locating, spacing or operating well or wells as to reduce or tend to reduce the total ultimate recovery of crude petroleum oil or natural gas from any pool.

(i) The escape into the open air, from a well producing both oil and gas, of natural gas in excess of the amount which is necessary in the efficient drilling or operation of the well.

(b) The drowning with water of any stratum or part thereof capable of producing gas in paying quantities.

(c) Underground waste or loss however caused and whether or not defined in other subdivisions hereof.

(d) Permitting any natural gas well to burn wastefully.

(e) The creation of unnecessary fire hazards.

(f) Physical waste or loss incident to, or resulting from, so drilling, equipping, or operating well or wells as to reduce or tend to reduce the ultimate recovery of natural gas from any pool.

(g) The escape into the open air, from a well producing both oil and gas, of natural gas in excess of the amount which is necessary in the efficient drilling or operation of the well.

(j) The production of crude petroleum oil in excess of transportation or market facilities or reasonable market demand. The Commission may determine when such excess production exists or is imminent and ascertain the reasonable market demand.

The Commission may consider any or all of the above definitions whenever the facts, circumstances or conditions make them applicable, in making rules, regulations or orders to prevent waste of oil or gas."

(h) The production of natural gas in excess of transportation or market facilities, or reasonable market demand for the type of gas produced.

(i) The use of natural gas for the manufacture of carbon black without first having extracted the natural gasoline content from such gas.

(j) The use of sweet gas produced from a gas well for the manufacture of carbon black.

(k). Permitting any natural gas produced from a gas well to escape into the air before or after such gas has been processed for its gasoline content.

(l) The production of natural gas from a well producing oil from a stratum other than that in which the oil is found, unless such gas is produced in a separate string of casing from that in which the oil is produced.

(m) The production of more than one hundred thousand (100,000) cubic feet of gas to each barrel of crude petroleum oil unless such gas is put to one or more of the uses authorized for the type of such gas so produced under allocations made by the Commission."

Thus, it may be seen that the provisions with reference to the definitions of underground waste which appear in House Bill No. 266, were simply copied from the general oil and gas conservation statute which was already in force at the time House Bill No. 266 was passed. The same thing is true as to the general authority delegated to the Railroad Commission in House Bill No. 266, as may be seen from the following comparison of the terms of the general conservation Act and of House Bill No. 266:

THE EXISTING LAW

"Sec. 4. * * * The Commission shall make and enforce rules, regulations or orders for the conservation of crude petroleum oil and natural gas and to prevent the waste thereof, including rules, regulations or orders for the following purposes:

HOUSE BILL NO. 266

"Sec. 6. The Commission shall make and enforce rules, regulations, or orders for the conservation of natural gas, to prevent the waste thereof, and otherwise to accomplish the purpose of this Article, including rules, regulations, or orders for the following purposes:

(1) To prevent the waste, as hereinbefore defined, of crude petroleum oil and natural gas in drilling and producing operations and in the storage, piping and distribution thereof.

(1) To prevent the waste, as hereinbefore defined, of natural gas in drilling and producing operations and in the piping and distribution thereof.

(2) To require dry or abandoned wells to be plugged in such way as to confine crude petroleum oil, natural gas, and water in the strata in which they are found and to prevent them from escaping into other strata.

(2) To require dry or abandoned wells to be plugged in such way as to confine natural gas, and water in the strata in which they are found and to prevent them from escaping into other strata.

(3) For the drilling of wells and preserving a record thereof.

(3) For the drilling of wells and preserving a record thereof.

(4) To require wells to be drilled and operated in such manner as to prevent injury to adjoining property.

(4) To require wells to be drilled and operated in such manner as to prevent injury to adjoining property.

(5) To prevent crude petroleum oil and natural gas and water from escaping from the strata in which they are found into other strata.

(5) To prevent natural gas and water from escaping from the strata in which they are found into other strata.

(7) To require records to be kept and reports made.

(6) To require records to be kept and reports made.

(8) It shall do all things necessary for the conservation of crude petroleum oil and natural gas and to prevent the waste thereof, and shall make and enforce such rules, regulations or orders as may be necessary to that end.

(9) To provide for the issuance of permits, tenders, and other evidences of permission when the issuance of such permits, tenders, or permission is necessary or incident to the enforcement of it rules, regulations, or orders for the prevention of waste."

(7) To provide for the issuance of permits, and other evidences of permission when the issuance of such permits or permission is necessary or incident to the enforcement of its blanket grant of authority to make any rules necessary to effectuate the law."

The same thing is true of the provisions of House Bill No. 266, which delegate to the Railroad Commission the duty or promulgating orders to prevent or lessen waste and to allocate the allowable production among the various wells. We compare the pertinent provisions:

THE EXISTING LAW

"Sec. 7.* * *

In the event any such rule, regulation or order which the Commission may adopt provides for the limitation or fixing of the production of crude petroleum oil, or of natural gas from wells producing gas only, in any pool or portion thereof, the Commission shall distribute, prorate, or otherwise apportion or allocate, the allowable production among the various producers on a reasonable basis."

HOUSE BILL NO. 266

"Sec. 14.

It shall be the duty of the Commission, after notice and hearing, to ascertain and determine the reasonable market demand for gas from gas wells to be used for light and fuel purposes and for all other lawful purposes to which sweet gas may be put under the terms of this Article and by proper order to restrict the production of gas from all gas wells in said field producing such gas to an amount equal to market demand or to an amount which may be produced without waste as otherwise defined; provided, however, the production of such gas shall in any event be restricted to the amount of the reasonable market demand thereof. In such order the Commission shall allocate, distribute or apportion the total allowable production from such field among the various gas wells affected by the order on a reasonable basis, and as provided in Section 13."

The only reason that the provisions with reference to the prevention of underground waste were inserted in House Bill No. 266 was to make this statute complete in itself. That House Bill No. 266 was not intended to supplant the general oil and gas conservation statute, insofar as gas is concerned, is made en-

tirely clear by the language of Section 25, House Bill No. 266, which reads as follows:

> "* * * provided, however, that nothing in this Act contained shall repeal, modify or impair any of the provisions of House Bill 782, relating to oil and gas conservation, enacted at this session of the Legislature, or shall impair the power of the Commission, proceeding under the oil and gas conservation laws of this State, to prevent waste."

House Bill No. 782 is the general oil and gas conservation statute which we have been discussing.

4. Appellants' construction of the Act is supported by the history of the legislation.

In view of the fact that all of the provisions with reference to the prevention of underground waste in the production of gas were already a part of the statute law of Texas at the time House Bill No. 266 was under consideration, it is clear that the ratable production features of House Bill No. 266 were not adopted with the sole object of preventing waste. The only other kind of waste that the Legislature had not disposed of in the general oil and gas conservation law, which substantially reenacted the preexisting law on the subject, was the matter of overground waste of gas, or, to put it in another way, the matter of regulating the uses to which gas might be put after production. It is evident that it was the conclusion of the Legislature of Texas that the adoption of a law which simply prohibited the use of sweet gas for stripping purposes or for the manufacture of carbon black, which did not at the same time set up a system which would protect the correlative rights of all the owners of gas

producing lands, and prevent disproportionate and unequal production, would inevitably fail as a proper or permanent solution of the problems before it. This is evidenced by the fact that the 44th Legislature of Texas refused to pass a bill (House Bill No. 151) which contained the same restrictions on the use of sweet and sour gas as appear in House Bill No. 266, but which did not have any provision for ratable production. (Exhibit 75, R. 381). This is further evidenced by the declaration of policy of House Bill No. 266, which is strongly persuasive. The legislative intent is clear: Public and private rights are to be protected, the past, present and imminent evils arising by reason of waste arise and would continue to arise "in the absence of correlative opportunities of owners of gas in a common reservoir to produce and use the same."[1] To assert that while the Legislature by solemn declaration recognized the direct cause of waste to be absence of correlative opportunities, but sought only to remove the result and leave the recurring cause unabated is to ascribe to the Legislature the intention of performing a futile action.

If the Legislature were not concerned with the problem of protecting the correlative rights of the owners of the surface in the common gas reservoirs of Texas, it could have adopted House Bill No. 151. (Exhibit 75, R. 381) By such adoption, when the existing oil and gas conservation act is taken into account, it would have provided full and complete legislation dealing

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[1]This is also the conclusion reached by others who have given study to conditions in the field. See discussion infra. pp. 81 to 88, this Brief.

with both the matter of underground and overground waste in the production and use of natural gas. House Bill No. 266 would have been entirely unnecessary. But if the Legislature had stopped at that point, the sweet gas producing portions of the Panhandle field would have been entirely dedicated to light and fuel uses, the outlet for which was entirely owned and controlled by the pipe line companies; and in view of the past history of the field the independent non-integrated owners of sweet gas producing lands would have no prospect of ever producing any gas from their lands for the uses permitted by the statute. It was to protect and adjust the correlative and coequal rights of all the owners of the producing sweet gas lands in the Panhandle and other gas reservoirs in Texas, and to prevent this result of unequal and disproportionate production on the part of any producer, that it was necessary for the Legislature to set up the comprehensive system contained in House Bill No. 266, providing for the restriction of the production of sweet gas to the reasonable market demand for same, and providing for the allocation of the total allowable among all the producers in the field.

We are aware of the rule, referred to in the opinion of the trial court, that where a statute may be construed in two ways and one of the constructions would render the statute unconstitutional, it is the duty of the Court to construe the statute so that it will be constitutional. We shall discuss elsewhere in this Brief the question as to whether or not the construction which we insist this statute requires, renders it unconstitutional. At this time, however, it seems sufficient to

say that the rule to which the trial court referred has reference only to statutes the language of which may be legitimately construed in different ways, and the rule does not entitle the court to ignore language which is not open to construction, or is not susceptible of two meanings. In other words, the court, in applying this rule, is not justified in writing a new law for the Legislature, and, if the language used by the Legislature is clear and unambiguous, it seems to be the clear duty of the Court to construe the language as it is written and to pass on the validity of the Act in view of the clear intent of the Legislature. *United States v. Hartwell*, 6 Wall. 385, 396, 18 L. ed. 830, 832.

In the matter of the statute in question it is our belief that the Texas Legislature manifested its will in no uncertain terms, and that the trial court's conclusion in this regard simply ignores what the Legislature has plainly said. This is especially true when the evils and problems with which the Texas Legislature was confronted, are taken into account.

Summarizing our argument on this point we submit that: (1) the language of House Bill No. 266 plainly manifests the legislative intent that the production of natural gas in any field shall be restricted to the daily market demand therefor, irrespective of the existence of underground waste; (2) such restriction of production is definitely for the "adjustment of the correlative rights and opportunities of each owner of gas in a common reservoir"; (3) when the facts justify it, the Railroad Commission may restrict gas production to prevent underground waste, but it is the mandatory duty of the Commission to restrict the total

gas production in any field to the daily market demand therefor, waste or no waste, as shown by the language of Section 14: "provided, however, the production of such gas shall *in any event* be restricted to the amount of the reasonable market demand therefor"; (4) the trial court entirely ignored the evils which were before the Legislature as well as the language of the Act; (5) the fact that a general conservation law was already in existence which completely dealt with the problem of underground waste in the production of gas in the same way House Bill No. 266 deals with it, shows definitely, if the matter were otherwise in doubt, that House Bill No. 266 is not solely a waste statute.

II.

The statute protects and adjusts the rights and interests of the several owners of the surface in a common gas reservoir, and prevents disproportionate or unequal withdrawals on the part of any operator. It is a valid exercise of the police power irrespective of the existence of underground waste in the production of gas.

Under another point in this brief appellants will contend that the trial court erred in holding that the orders of the Railroad Commission of Texas involved herein did not relate in any reasonable manner to the prevention of underground waste in the production of gas. Assuming at this point, however, that the orders cannot be sustained as a waste prevention measure, we nevertheless assert that the statute and orders in question are a valid exercise of the state's police power, since they operate for the protection and adjustment of the correlative rights and interests of the several

owners of the gas reservoirs of Texas, preventing disproportionate and unequal withdrawals or production on the part of any producer in a gas reservoir in which other producers have rights and interests.

The trial court held that House Bill No. 266 was subject to no such construction, which holding is discussed under our first point. The trial court further held, however, that even if the Legislature intended to provide for the regulation of gas production for a purpose other than prevention of waste, the Act and orders are invalid because: (1) they confiscate appellees' private markets and facilities, and devote them to others; (2) they prevent appellees from protecting themselves against drainage; and (3) they serve no public interest. (R. 184). Error was assigned to each of these conclusions. (R. 193-194).

We think it has been clearly demonstrated by the discussion under our first point that the trial court has misread the Statute, and that regulation for the adjustment and protection of correlative rights is clearly provided for. This being true, two questions arise: First, does the power exist in the Legislature of Texas to pass a law providing for the regulation of production from a commonly owned gas reservoir irrespective of underground waste; and, second, do the facts presented by the record justify the exercise of that power.

1. **Legislative power exists to pass a statute providing for the regulation of the rights of owners in a commonly owned property or fund.**

   A. The authorities sustain the view that the power may be exercised as to property in oil and gas.

One of the leading cases is *Ohio Oil Company v. Indiana*, 177 U. S. 190, 44 L. ed. 729, 20 S. Ct. 576. This case involved a statute of Indiana which made it unlawful for any person to permit gas from any well to escape into the open air for more than two days without being confined in the well, or proper pipe line, or other safe receptacle. Mr. Justice White, in delivering the opinion of the Court, stated clearly a fact which is now accepted without argument, namely, that every producer and owner in a common reservoir is affected by the conduct of every other producer in such reservoir. He used this language:

> "No one owner of the surface of the earth within the area beneath which the gas and oil move, can exercise his right to extract from the common reservoir, in which the supply is held, without, to an extent, diminishing the source of supply as to which all other owners of the surface must exercise their rights." (177 U. S. 203).

The court then holds that, in view of the peculiar nature of oil and gas reservoirs, and the fact that rights therein must necessarily be enjoyed in common by the owners, the power rests in the Legislature of the State to protect and adjust those rights. This language is used:

> "* * * As to gas and oil the surface proprietors within the gas field all have the right to reduce to possession the gas and oil beneath. They could not be absolutely deprived of this right which belongs to them without a taking of private property. But there is a coequal right in them all to take from a common source of supply the two substances which in the nature of things are united, though separate. It follows from the es-

> sence of their right and from the situation of the things as to which it can be exerted, that the use by one of his power to seek to convert a part of a common fund to actual possession may result in an undue proportion being attributed to one of the possessors of the right to the detriment of the others, or by waste by one or more to the annihilation of the rights of the remainder. Hence it is that the legislative power, from the peculiar nature of the right and the objects upon which it is to be exerted, can be manifested *for the purpose of protecting all the collective owners, by securing a just distribution, to arise from the enjoyment, by them, of their privilege to reduce to possession, and to reach the like end by preventing waste.*" (177 U. S. 209, italics ours.)

This language was quoted with aproval by the Supreme Court of Texas in the leading case of *Brown v. Humble Oil & Refining Co.*, (not yet officially reported), 83 S. W. (2d) 935 at 942, 99 A. L. R. 1107. The reasoning of Mr. Justice White was expressly held to be "equally applicable to the laws of this state."

Physical waste was of course presented by the facts of the Ohio Oil Company case, but the language of the opinion cannot be fairly restricted to such a fact situation. Indeed, the waste feature, as a basis for sustaining the act, seemed merely incidental to the fundamental basis of adjusting conflicting rights to secure "a just distribution." If a condition exists in a common oil or gas reservoir where one operator or group of operators is so situated that they can or do withdraw a disproportionate amount of oil or gas to the detriment of others, who also own an interest in

such reservoir, an evil is presented which the Legislature may prevent by the exercise of its power. We find it impossible otherwise to construe the language of the Court:

> "It follows from the essence of their right, and from the situation of the things as to which it can be exerted, that the use by one of his power to seek to convert a part of a common fund to actual possession my result in an *undue proportion* being attributed to one of the possessors of the right to the detriment of the others * * *." (177 U. S. 209; italics ours)

The portion of the opinion just quoted has no reference to the prevention of waste. It addresses itself only to the evil presented by the opportunity for an undue proportion of oil or gas to be produced from the common reservoir by one producer to the detriment of others also entitled to produce therefrom. Where this condition exists or may exist, the legislative power may be "manifested for the purpose of protecting all the collective owners *by securing a just distribution* to arise from the common enjoyment by them of their privilege to reduce to possession * * *."

In other words, the coequal rights of the owners of a common pool may be protected, first, by a restriction or regulation of the right to withdraw oil or gas so as to secure a just distribution of the resources contained in the pool; or second, by a prohibition against the commission of physical waste. The remedy to be adopted is, of course, a matter of legislative choice. If a fact situation be presented where, on account of economic maladjustments or otherwise, one group of

operators is in a position to withdraw a disproportionate amount of oil or gas from the common pool, the Legislature does have the power to address itself to this condition, even in the absence of physical waste as that term is ordinarily used.

That we have not misconstrued the meaning of the court in the *Ohio Oil Company* case may be seen by the explanation of the decision which is given in the case of *West v. Kansas Natural Gas Co.*, 211 U. S. 229, 55 L. ed. 716, 31 S. Ct. 564. In its discussion of the *Ohio Oil Company* case the opinion has this language:

> "The right of taking the gas, it was said, was common to all owners of the surface, and because of such a common right in all landowners, an unlimited use * * * by any it was competent for the state to prohibit. This limitation upon the surface owners of property was justified by the peculiar character of gas and oil, they having the power of self-transmission, and that therefore to preserve an equal right in all surface owners there could not be an unlimited right in any." (221 U. S. 252).

The trial court in the case at bar has said that the *Ohio Oil Company* case and other cases are authorities solely on the power of regulation to prevent waste. In the *West* case, Mr. Justice McKenna thus explains the Indiana statute which was sustained in the *Ohio Oil Company* case:

> "Its purpose was to secure to the common owners of the gas a proportionate acquisition of it * * *." (221 U. S. 254).

The right to regulate to secure proportionate taking or production is reiterated in the case of *Walls v. Midland Carbon Company*, 254 U. S. 300, 65 L. ed. 276, 41 S. Ct. 118. That case involved the validity of a Wyoming statute which had the effect of prohibiting the use of natural gas for carbon black manufacture within ten miles of an incorporated town or industrial plant. There, the court said:

> "A state may consider the relation of rights, and accommodate their coexistence, and, in the interest of the community, limit one that others may be enjoyed." (254 U. S. 315).

Mr. Justice McKenna pointed out that in the *Ohio Oil Company* case the use of either oil or gas by one owner of the surface

> "* * * affected the use of other owners, and an excessive use by one diminished the use by the others * * *." (254 U. S. 317).

and that

> "* * * the state may interpose its power to prevent a waste or disproportionate use of either gas or oil by a particular owner in order to conserve the equal right of other owners and advance the public interest." (254 U. S. 317)

The doctrine of the *Ohio Oil Company* case was definitely applied in the *Walls* case. The Court said:

> "The determining consideration is the power of the state over, and its regulation of, a property in which others besides the companies may have rights, and in which the state has an interest to adjust and preserve, natural gas being one of the resources of the state. And in this consideration

it is more important to consider not for what a particular owner uses the gas, but the proportion of his use to that of others; or, it may be, the prevention of use by others * * *." (254 U. S. 319, emphasis ours).

The *Walls* case presents a regulation to prohibit an uneconomic use of natural gas, or a use for inferior purposes, but the court clearly declared that the important thing to be considered was not the use which was made of the gas, "but the *proportion* of his use to that of others, or, it may be, the prevention of use by others." In other words, the Legislature had the right to prevent the continuance of a field condition which resulted in a disproportionate amount of the common fund being secured by one group, or perhaps a total extinction of the right of certain producers to withdraw any gas at all from their wells.

There is nothing in the opinion in the *Walls* case to indicate that the legislative power may be exercised only in the prevention of waste. Indeed the average operator, in so far as he is affected by the conduct of his neighbors in producing from a common pool, is usually much more concerned with the matter of amount of production by his neighbors than he is with the use made of the oil and gas which is produced.

The statute involved in the *Walls* case addressed itself only to the use which was made of gas after production; and, while the use of gas for the manufacture of carbon black may be socially uneconomic or undesirable, a beneficial use is made of the gas. Manufacturers of carbon black, however, are not restricted in their consumption of gas by the existing market for

carbon black, since carbon black may be stored if there be production in excess of market demands. The same may not be said of those who produce gas for the purpose of supplying the domestic needs of a town for fuel. It follows that, in the absence of legislative regulation, carbon black manufacturers in Wyoming were in a position to withdraw an entirely disproportionate amount of gas from the reservoir which they owned in common with those supplying gas for light and fuel purposes. In such situation "a state may consider the relation of rights and accommodate their coexistence, and, in the interest of the community, limit one that others may be enjoyed."

There is an interesting discussion of the right of the state to regulate the exercise of the correlative rights of surface owners with respect to a common source of supply of oil or gas in the case of *Bandini Petroleum Co. v. Superior Court*, 293 Pac. 899. The California statute which prohibits the unreasonable waste of natural gas in the production of oil was involved. The District Court of Appeal entered into an exhaustive discussion as to whether or not the right of a state to restrict or regulate the manner or amount of production from a common oil or gas pool should be based on the theory of protecting "correlative rights," or on the interest of the public at large in the conservation of these irreplaceable resources. The court came to the conclusion that the legislation there under consideration should be sustained by an application of the principle that the state has a right to exercise its police power to protect the coexisting rights of the owners of a common pool. We quote the following:

"It is apparent from the quotations that the legislative power of the state may be exercised for the purpose of adjusting coexisting rights. They also tend to indicate that the state may restrict or regulate the production of oil or gas on the theory of the public's interest in their natural resources. Whether this latter may be done we think it unnecessary to a decision of the present application. * * *

"The legislation was evidently adopted upon the theory that in every oil field there is what we may term (at least for illustrative purposes) a normal proportion of gas to oil; that when an unreasonable disproportion of gas to oil exists in a given well there is a corresponding loss of recoverable oil by other owners who would likewise employ the lifting power of the excessive gas to good purpose; and that this *disproportionate production of gas* should not be permitted unless the gas as a separate thing be conveniently necessary for domestic or industrial purposes." (293 Pac. 903, 904. Italics ours).

The same injunction order which was involved in the case just cited reached the Supreme Court of California in another case, *People v. Associated Oil Co.*, 221 Cal. 93, 294 Pac. 717. Language appears in the opinion of the Supreme Court of California which may be construed by some as an expression of the opinion of that court that the right to produce oil or gas from a common reservoir cannot be restricted or regulated except to prevent waste.

The *Bandini* case, however, reached this court, as *Bandini Petroleum Co. v. Superior Court*, 284 U. S. 8, 76 L. ed. 136, 52 S. Ct. 103. Mr. Chief Justice

Hughes refused to take the position that it was the intention of the Supreme Court of California to deny the operation of the California statute "as a safeguard of the coexisting rights of surface owners." In its opinion this court sustained the statute, which prohibited the unreasonable waste of natural gas, as follows:

> "If the statute be viewed as one *regulating the exercise of the correlative rights of surface owners with respect to a common source of supply of oil and gas,* the conclusion that the statute is valid upon its face, * * * is fully supported by the decisions of this Court. Ohio Oil Co. v. Indiana, 177 U. S. 190, 210, 211, 44 L. ed. 729, 739, 740, 20 S. Ct. 576, 20 Mor. Min. Rep. 466; Lindsley v. Natural Carbonic Gas Co. 220 U. S. at p. 77, 55 L. ed. 377, 31 S. Ct. 337, Ann. Cas. 1912C, 160, supra; Walls v. Midland Carbon Co. 254 U. S. 300, 323, 65 L. ed. 276, 286, 41 S. Ct. 118. In that aspect, the statute unquestionably has a valid operation, * * *." (284 U.S. 22, italics ours).

Curiously enough, the trial court's opinion (R. 157) in the case at issue takes consolation from the language of the Supreme Court of California in the case of *People v. Associated Oil Co.*, supra, and entirely overlooks the fact that Mr. Chief Justice Hughes, in delivering the opinion of this Court, expressly sustained the California statute on the principle announced by the District Court of Appeal, that is, that the statute operated as a safeguard of the coexisting rights of surface owners and not on the basis set forth inferentially in the opinion of the Supreme Court of California.

We do not wish to be understood as contending that the State, solely in the interest of the public as distinguished from the interests of the owners of a common pool, is without power to legislate against the commission of waste in the production of oil and gas, or that the public has no interest in the regulation and adjustment of the coexisting rights of the owners in the surface even in the absence of waste. We do urge, however, that the Legislature has the power to provide for the restriction or regulation of the production of either oil or gas where they are necessary to assure a fair percentage of such production by each of the owners of the common pool, and this right exists regardless of the existence of waste.

In the case of *Russell v. Walker*, 160 Okl. 145, 15 Pac. (2d) 114, the Supreme Court of Oklahoma said:

> "Under the rule stated in the Champlin case, supra, and in C. C. Julian Oil & Royalties Co. v. Capshaw et al., 145 Okl. 237, 292 Pac. 841, it is within the police power of the state to impose reasonable regulations to the end that some of said owners may not take from the common source of supply more than their equitable share." (15 Pac. (2) 118).

On the day that the opinion was handed down which is involved in this appeal, the same court handed down an opinion in the case of *Henderson Co. v. Thompson*, 14 Fed. Supp. 329. This latter case involved the constitutionality of those provisions of House Bill No. 266 which prohibit the use of sweet gas for the manufacture of carbon black. The statute was sustained, and an appeal has been taken to this

Court from the decision. This language appears in the opinion of the three-judge trial court:

> "A Texas landowner owns the gas in place under his land and he may withdraw the same by mining operations, and if in the course of so doing part of his neighbor's gas migrates to his land, he may withdraw that gas without liability. The statement of these facts, coupled with the known migratory character of gas, immediately makes it apparent that there must be some limitations upon these property rights which exist in the landowner. While he has the unquestioned right to withdraw his gas, and such gas as may migrate to his land, it is perfectly evident that if he does so in a wasteful manner or for a wasteful purpose he has exceeded any property right which he may have been thought to have had. The migratory nature of gas distinguishes it from other minerals which are fixed. An owner of a coal mine or of a sulphur mine might withdraw his minerals and destroy them without injury to his neighbor, other than such injury as he sustains in common with the general public in that economic loss, *but the owner of a gas well, who under the captured doctrine, withdraws gas which has theretofore been his neighbor's and uses it wastefully, thereby not only destroys a natural resource of the state, but impinges upon the rights of others in the common reservoir.*" (Italics ours.)

It is difficult for us to reconcile the language of this opinion to the effect that the manufacture of carbon black from sweet gas may be prohibited because it impinges on the rights of others in the reservior with the court's ruling in the instant case where it is held that the power of the Legislature to restrict production of

gas in the adjustment and protection of the correlative rights of the owners of the surface is limited to the prevention of waste. In the first place, it must be perfectly obvious that, in so far as the withdrawals from the common reservoir by one operator injure the other owners of the surface other than as members of the general public, such injury is sustained on account of the *amount* of oil or gas withdrawn, and not on account of the *use* to which it is put after it is produced. In the second place, it is clear that the act of producing natural gas and the act of utilizing it after production are two entirely different things. Yet the trial court in the *Henderson* case has held, and rightly so, that production of gas fit for light and fuel purposes may be entirely prohibited to prevent its being put to a use which the Legislature has found to be socially undesirable. This type of restriction of production, of course, has no relation to the prevention of underground waste in the production of gas. The conclusion necessarily follows that production of gas may be restrained under the police power for other reasons than to prevent the commission of underground waste. The regulation is sustained: first, because it prevents one operator from impinging upon the rights of others in the common reservoir; and second, on account of the interest of the public. Such is the effect of the trial court's holding in the *Henderson Company* case.

The *production* of gas which was restrained in the *Henderson Company* case was non-wasteful in that the waste (from an inferior use) took place after the gas was produced, and was not in any sense an incident to the act of production. The conclusion neces-

sarily follows that a non-wasteful and efficient act of production may be wholly prohibited where the Legislature finds it necessary to effectuate its policy with reference to a limitation of the use of natural gas to preferred uses or for more beneficial purposes. If production for inferior uses may be entirely prohibited, either in the protection of the coexisting rights of the owners of the surface of the reservoir, or in the public interest, it should follow that a mere regulation of production for the same or similar purposes is well within the limits of the police power. Certainly, if the Legislature can entirely prohibit non-wasteful production for inferior uses it cannot fairly be said to violate constitutional guaranties when it merely regulates non-wasteful production.

We believe that the principles laid down in the *Henderson Company* case are correct and are strictly in accord with the principles set out in the *Walls* case. Applying these principles to the situation presented by this appeal, it is difficult to understand the lower court's ruling that it is beyond the power of the Legislature to provide for the regulation of the non-wasteful production of natural gas to protect property rights and adjust conflicting interests. So far as the record in the *Henderson Company* case shows, the producers who were selling their gas to the Henderson Company were not guilty of acts of waste in producing their gas in the manner in which it was produced and selling it in the open market. They produced their gas in exactly the same manner as do the appellees. Yet the effect of the statute sustained in the *Henderson Company* case is to prohibit the production of sweet gas if, after pro-

duction, it be used for the manufacture of carbon black. And if such non-wasteful production may be prohibited or regulated under stated conditions, it must follow that the Legislature must be the judge of the conditions under which the regulation should be imposed as a matter of public policy.

The exercise of the police power in the adjustment and protection of the coexisting and coequal rights of persons is not by any means limited to the production of oil or gas; and the fact that in certain of the oil and gas cases physical waste was presented by the facts is not an explanation of the decisions. The principles which those cases announced would have been applied just as readily to a law which had for its purpose the adjustment of production so that each might have the opportunity to recover his fair share of the contents of the common pool. Due process of law or equal protection of law are no more denied when ratable production is required for the protection of correlative rights than when it is imposed in order to prevent waste.

B. The State has an interest in the accomodation of correlative rights in various types of property.

Where citizens of a state have a common interest in the use or enjoyment of any type of property, the police power is bound to extend to the adjustment of that use so that all may be protected. *Bacon v. Walker*, 204 U. S. 311, 51 L. ed. 499, 27 S. Ct. 289, is illustrative. This case involved the right of the State of Idaho to prohibit persons owning sheep from permitting them to graze within two miles of the possessory claims or dwelling houses of other people. It was admitted that all persons had the right to graze

stock on the public domain, and the object of the statute was to adjust the rights of those owing cattle with those owning sheep. The Supreme Court in sustaining the validity of the statute, said:

> "Is it true, therefore, even if it be conceded that there is right or license to pasture upon the public domain, that the state may not limit or regulate the right or license? Defendants in error have an equal right with plaintiff in error, *and the state has an interest in the accommodation of those rights.*" (204 U. S. 315, Italics ours).

The Court referred to the opinion of the state court as follows:

> "And the Court pointed out that it was not the purpose or effect of the statutes to make discriminations between sheep owners and owners of other kinds of stock, but to secure equality of enjoyment and use of the public domain to settlers and cattle owners with sheep owners." (204 U. S. 319).

Thus it may be seen that the application of the correlative rights doctrine has been applied to the adjustment of conflicts between sheep owners, cattle owners, and owners of dwellings. No physical waste of a natural resource was involved, and none was needed. Coequal and coexisting rights in a common property were sufficient for the police power to intervene and adjust conflicts, and to insure to each class the opportunity to continue in business and enjoy the public domain.

Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61, 55 L. ed. 369, 31 S. Ct. 337, is in point. This

case involved the validity of a New York statute which prohibited the pumping or otherwise drawing by artificial appliances from any artesian well bored into the rock, mineral waters holding in solution natural mineral salts and an excess of carbonic acid gas, for the purpose of extracting and vending such gas as a separate commodity or otherwise than in association with the mineral water itself. The facts recited are to the effect that the gas company was primarily in the business of collecting, compressing and selling the gas as a separate commodity, but that it also bottled and sold for drinking purposes as much of the mineral water pumped from its wells as the market would consume, although it appeared that a large proportion of the waters pumped from the company's wells were allowed to waste. The statute had been construed by the courts of New York to apply only to the production of water and gas from a source of supply in which others besides the particular producer had an interest; in other words, to common sources of supply. The statute was sustained as constitutional on the ground that it prevented the excessive or wasteful withdrawals from the common reservoir on the part of one producer to the detriment of others also entitled to produce therefrom.

It is true that actual waste was presented by the facts of this case, although it appears that at least a part of the water produced was marketed as a separate commodity apart from the gas. Certainly, as to that part of the water which was actually sold for drinking purposes, no contention can be made that a wasteful practice was occurring, yet the prohibitions of the stat-

ute applied just as much to this character of transaction as to those when the water was allowed to waste. Without regard to this point, however, it is clear from the opinion that the statute sustained was as much concerned with the excessive withdrawals on the part of certain operators as it was with the matter of waste. Indeed the statute did not even apply where the source of supply was owned entirely by one operator.

This matter of excessive or disproportionate withdrawals, which *pro tanto* reduce the common source of supply to which all are entitled to resort, is the thread which runs through all of the cases which deal with the rights of owners in a common property. In many of the cases, of course, the facts show a wasteful use of the commodity involved; but it must be plain that, regardless of the use which is made of the oil, gas or water, if one producer withdraws more than his fair share of the common fund, his excess production is bound to be to the detriment of all others entitled to resort thereto. It is the amount produced and not the use to which it is put that injures his neighbors. It is difficult for us to see how any doubt can be raised that the police power of the state entitles its Legislature to enact laws in the adjustment of the rights of all the owners of the common fund."

Thus, in *Hathorn v. National Carbonic Gas Co.*, 194 N.Y. 326, 87 N.E. 504, 23 L. R. A. (N.S.) 436, the court said:

> "They (the public) have an interest in the preservation of natural products like these mineral waters, and it fairly may be said that they have a substantial and enforceable interest in preserving

> the just and reasonable use, by all members of a community, of a common supply of a natural product, and in so curtailing the attempts of one or a few to get an *unjust proportion thereof* that the rights of other members of the community will not be interfered with, and that disputes and litigation shall not be precipitated, and that large amounts of property shall not be endangered." (Italics ours)

There are many cases where courts of equity, even in the absence of statute, have intervened to prevent one person from securing an unjust proportion of a common fund of percolating or artesian waters to the detriment of others entitled to enjoy the benefit of the waters. See *Bassett v. Salisbury Mfg. Co.*, 43 N. H. 569, 82 Am. Dec. 178; *Katz v. Walkinshaw*, 141 Cal. 116, 70 Pac. 663; *Meeker v. East Orange*, 77 N. J. L. 623, 74 Atl. 379; *Forbell v. New York*, 164 N. Y. 522, 58 N. E. 644, 51 L.R.A. 695.

There are, of course, other cases which follow the doctrine of *Acton v. Blundell*, 12 Mees. & W. 324, to the effect that, in the absence of a governing statute, one may not be restrained in the amount of percolating waters he withdraws, regardless of the effect of such withdrawals on others. The so-called American rule of reasonable use, however, has constantly grown, especially in the western states where local conditions made some sort of control vital to the interest of the people. Statutory regulations designed to accomplish the protection of the rights of all entitled to produce such waters have been enacted and sustained irrespective of any waste factor. *Ex parte Elam*, 6 Cal. App.

233, 91 Pac. 811; *Eccles v. Eccles*, 23 N. M. 235, 167 Pac. 726.

As was said by the court in *Eckel v. Springfield Tunnel & Development Co.*, 262 Pac. 425 (quoting from authorities):

> "There is a distinction between the English rule as modified by the modern American rule of reasonable use and the rule of correlative rights. Under the rule of reasonable use some of the authorities hold that a land owner has a right to make such a beneficial use of the water found percolating through his land to the extent that may be necessary for the improvement of his land, so long as it is used thereon, although in so doing he may drain the lands of his neighbors. Upon the other hand, the rule of correlative rights to these owners is the rule which abrogates the English rule as to these waters and holds that the rights of all land owners over a common basin, saturated strata, or underground reservoir, are coequal or correlative, and that one land owner can not extract more than his share of the water even for use on his own lands, where the rights of others are injured thereby." (262 Pac. 427)

The doctrine of the water cases had its growth, not because of the existence of waste and the use which was made of the waters involved, but by virtue of the recognition on the part of courts and legislatures that where many are withdrawing or have the right to withdraw from a common source of supply, the coequal rights of all must necessarily be adjusted or regulated so that each may have the opportunity to enjoy the common fund.

The principle is a logical outgrowth of the *sic utere* doctrine, which is the very foundation of the police power of the state.

Head v. Amoskeag Mfg. Co., 113 U. S. 9, 28 L. ed. 889, 5 S. Ct. 441, is apposite. The Legislature of New Hampshire passed a law authorizing the erection of mill dams upon and across any non-navigable stream, even though the erection of the dam had the effect of overflowing, draining or injuring the land of other persons, providing, however, for the payment of damages to the persons damaged. In effect the statute, in a backhanded sort of way, conferred the right of eminent domain on mill owners. The Supreme Court, however, refused to pass on the constitutionality of the statute as a delegation of the right of eminent domain, because the statute could be sustained on the right of the Legislature under its police power to regulate and adjust the rights of proprietors adjacent to streams. The opinion has this language:

> "We prefer to rest the decision of this case upon the ground that such a statute, considered as regulating the manner in which the rights of proprietors of lands adjacent to a stream may be asserted and enjoyed with a due regard to the interests of all, and to the public good, is within the constitutional power of the Legislature.
>
> "When property, in which several persons have a common interest, cannot be fully and beneficially enjoyed in its existing condition, the law often provides a way in which they may compel one another to submit to measures necessary to secure its beneficial enjoyment, making equitable compensation to any whose control of or interest in the property is to be modified." (113 U. S. 21).

In the *Head* case the Legislature decided that the co-existing rights of the owners of lands adjacent to non-navigable streams could be fairly adjusted by permitting one to overflow the land of another in the erection of a dam and providing for compensation. This was the remedy which the Legislature decided was necessary to provide for the adjustment of the conflict presented by the interests there involved.

Under a different fact situation, it has been held that the Legislature of a state has the power to require each owner of property, in which others have an interest, to incur expense even against his will. In *Wurts v. Hoagland*, 114 U. S. 606, 29 L. ed. 229, 5 S. Ct. 1086, a New Jersey statute was sustained providing for the drainage of any low or marshy land, upon proceedings instituted by at least five owners of separate lots included in the tract, the expense to be shared by all the owners. The opinion has this language:

> "This review of the cases clearly shows that general laws for the drainage of large tracts of swamps and lowlands, upon proceedings instituted by some of the proprietors of the lands to compel all to contribute to the expense of their drainage, have been maintained by the courts of New Jersey (*without reference to the power of taking private property for the public use under the right of eminent domain, or to the power of suppressing a nuisance dangerous to the public health*) as a just and constitutional exercise of the power of the legislature to establish regulations by which adjoining lands, held by various owners in severalty, and in the improvement of which all have a common interest, but which, by reason of

> the peculiar natural condition of the whole tract, can not be improved or enjoyed by any of them without the concurrence of all, may be reclaimed and made useful to all at their joint expense." (114 U. S. 613, Italics ours).

The doctrine of the two cases last cited was reiterated in the leading case of *Fallbrook Irrigation Dist. v. Bradley*, 164 U. S. 112, 41 L. ed. 369, 17 S. Ct. 56, in the following language:

> "If it be essential or material for the prosperity of the community, and if the improvement be one in which all the landowners have to a certain extent a common interest, and the improvement cannot be accomplished without the concurrence of all or nearly all of such owners by reason of the peculiar natural condition of the tract sought to be reclaimed, then such reclamation may be made and the land rendered useful to all and at their joint expense. In such case the absolute right of each individual owner of land must yield to a certain extent or be modified by corresponding rights on the part of other owners for what is declared upon the whole to be for the public benefit." (164 U. S. 163).

Instances where the police power has been applied in the regulation of conduct which will necessarily affect the rights and interests of others may be multiplied without number. An extreme example is afforded by the party-wall cases, such as *Jackman v. Rosenbaum Co.*, 260 U. S. 22, 67 L. ed. 107, 43 S. Ct. 9, and *Swift v. Calnam*, 102 Iowa 206, 71 N. W. 233, where statutes were upheld which allowed one person to build a party-wall on his neighbor's land even without the neighbor's consent.

Summarizing our argument on this point, we urge (1) that the very foundation of the police power is that no person shall be permitted to use his property in such a way as to prevent or interfere with the use others are entitled to make of their property; (2) that the police power of the state reaches the adjustment and protection of the rights of all of those who own an oil or gas reservoir in common, though in severalty: and (3) that the state may interpose to prevent disproportionate, unreasonable or excessive withdrawals from the common fund on the part of one to the detriment of others, irrespective of the existence of waste.

2. **Facts presented by the Record justify exercise of the power.**

We now turn to an examination of the facts presented by this record.

The Panhandle gas field has been divided by the Railroad Commission into two zones: (1) the East Panhandle Field, consisting of Wheeler County and the eastern portion of Gray County; and (2) the Western Panhandle Field, consisting of the western portion of Gray County and the counties of Hartley, Moore, Hutchinson, Potter and Carson. Consolidated Gas Utilities Corporation produces gas only in the East Panhandle Field; Texoma Natural Gas Company produces gas into its own lines only in the West Panhandle Field, although it owns certain producing wells in the East Panhandle Field.

Inasmuch as the Panhandle field is a common reservoir, from which oil wells, sour gas wells and sweet gas wells are withdrawing gas, the problem of

somehow reconciling the rights of the conflicting interests is unusually complicated.

There are 2597 oil wells in the Panhandle field. (R. 302). Since gas is an important propulsive factor in the production of oil in the Panhandle, these oil wells necessarily produce large quantities of gas along with oil. The magnitude of the part oil interests play in the picture may be appreciated, when it is realized that there are about 50 different productive oil pools in the Panhandle field, all more or less interconnected; all in juxtaposition to gas strata (R. 169); such oil pools extend a distance of about 90 miles along the northern edge of the structure, consist of about 200,000 acres of land, and contain probably one billion barrels of recoverable oil (R. 403).

Second, there are about 270,000 acres in the West Panhandle field which are productive of sour gas (R. 170), on which 211 wells have been drilled, and are now producing with a daily potential producing capacity of 2,128,328,000 cubic feet (R. 227). Practically one-third of the free gas originally in the West Panhandle gas field was sour gas (R. 220). There are still practically 2-1/3 trillion cubic feet of sour gas in place in the West Panhandle field (R. 226).

Third, there are 723,000 acres productive of free sweet gas in the West Panhandle field (R. 170), containing 8.78 trillion cubic feet of sweet gas (R. 226); and 181,000 acres in the East Panhandle field containing 2.3 trillion cubic feet of sweet gas (R. 226). There are at least 473 sweet gas wells in the West Panhandle field, of which 180 have no outlet for light and fuel

purposes (R. 176, 187). There are 322 sweet gas wells in the East Panhandle field, of which 121 do not have an outlet for light and fuel purposes. (R. 187).

In addition, 28 carbon black plants, supplying 80% of the nation's carbon black, and 41 gasoline extraction plants, were operating in the field when the Act was under consideration in the Legislature (R. 321).[1]

All these various elements were presented to the Legislature of Texas. Somehow it had to work out a solution of the problem, consistent with the protection of the equities of all who owned substantial interests in the common reservoir.

Failure to act would leave hundreds of millions of barrels of oil unrecovered and would permit the premature exhaustion of the gas reservoir (R. 327), since, under the existing order of things, more than a billion cubic feet of gas was being wasted into the air every day (R. 551). This was an evil with which the Legislature had the right to be concerned on account of the public and private interests involved.

There were still other evils. A system of inequitable, disproportionate and unratable production was rife in the gas field (R. 224). Certain operators were producing each day as much as 25% of the capacities of their wells; others were producing lesser amount on account of the limited nature of their outlets. Still

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[1]An excellent analysis of the history of gas production in the Panhandle field and the conflicts which have arisen appears in the **Report of the Federal Trade Commission to the Senate of the United States, 70th Congress, First Session, Document 92, Part 84-A**, pages 94-101.

others, owners of developed gas lands, were not producing at all on account of the lack of an outlet. Nearly a half billion cubic feet of gas per day, much of it sweet gas, was being used for the manufacture of carbon black, an inferior use of sweet gas (R. 551).

So the problem in general may be seen. The sweet gas pipe line producers, including appellees, owners of 80% of the sweet gas portions of the field. (R. 175) undoubtedly had a part in the picture. But it cannot be said that the owners of the remaining 20%, amounting to practically 200,000 acres, with 301 sweet gas well out of a total of 795 did not have rights which must be considered.

The sour gas producers, owners of 270,000 acres in the field likewise had rights to be considered. So did the oil producers, owners of some 2600 oil wells, and operating in 50 interconnected oil pools. So did the carbon black interests, and the important industries, such as rubber tire and ink manufacturers, who are dependent on the Panhandle field for their supply of carbon black. And finally, there was the interest of the public itself,[1] which surely justified not only putting to an end the wasteful practices of the gasoline extraction plants, but also adopting a comprehensive solution of the whole problem which would permit the field to be operated in an orderly, non-controversial way, with a fair recognition of the rights of all concerned.

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[1]The trial court found that gas from the Panhandle gas field is supplied for domestic and industrial light and fuel purposes to approximately 10 million persons in the United States. (R. 187).

The Legislature of Texas, after months of hearings and investigation (R. 373), passed House Bill No. 266. For the first time it dealt with the whole problem in a comprehensive way. Sweet gas was restricted to light and fuel uses.[1] Sour gas, being unfit for light and fuel uses, was permitted to be used in carbon black manufacture. The escape from gasoline extraction plants of residue gas into the open air was prohibited. Efficient gas-oil ratios in the operation of oil wells was provided for. And finally, a system of ratable production was set up in the gas fields of Texas.

If power does not rest in the Legislature of Texas to provide for a solution of the many conflicts of interests and rights presented, where does the power reside? Surely, on the most elementary principles, the police power includes the right to deal with vital local conditions which are detrimental to the public welfare, and are resulting in serious, never-ending clashes between private interests. And if the solution of the problem was the Legislature's, it seems that no principle of constitutional law required it to stop short of providing a remedy to protect in a reasonable way every interest involved. In dedicating the sweet gas

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[1]House Bill No. 266 also permits the use of sweet gas for (1) efficient chemical manufacturing, (2) gas lift operations, and (3) the extraction of the natural gasoline content where the residue gas is returned to the horizon from which it is produced. The record shows (R. 328) that it is not mechanically possible or feasible to return gas to the horizon from which it was produced, and that there is no demand for gas for the other uses permitted. The trial court has expressly found that the practical effect of the law is to restrict sweet gas to light and fuel uses (R. 187).

field to the exclusive uses of appellees, and those similarly situated (R. 187, Finding of Fact, par. 3; also see footnote, ante p. 29), the Legislature was entitled also to protect the ownership and rights of those who owned the sweet gas field in common with the integrated pipe line producers.

From the foregoing it may be seen that the issues presented by this appeal may not be considered solely from the standpoint of the sweet gas producers. However, since it is the regulation of sweet gas production which is specifically involved in this appeal, a brief recital of the history of the field from that standpoint may be helpful in understanding the legislative problem and solution. To do this, it is convenient to divide the story into periods.

(1) BEFORE 1933. Although the Panhandle gas field was discovered earlier, it was not until 1928 that substantial quantities of gas were produced from the field from gas wells, and it was not until 1931 that the building of major pipe lines into the gas field for the purpose of withdrawing gas therefrom for light and fuel purposes was completed (R. 145). Three major pipe lines were built into the East Panhandle field and six major pipe lines were built into the West Panhandle field, with a total capacity of approximately one billion cubic feet of gas per day. Prior to 1933, the statutes of Texas prohibited the use of natural gas except for light and fuel purposes.[1]

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[1]This statute is set forth in Appendix "B" of this Brief. See **F. C. Henderson, Inc., v. Railroad Commission**, 56 Fed. (2d) 218, sustaining same in its amended form. (Appendix "C").

Then, as now, the only outlet for sweet gas for light and fuel purposes was that afforded by the so-called integrated pipe line companies.[1] There were sweet gas acreage and wells in both the East and West Panhandle fields other than those owned by the pipe line companies. Since the pipe line companies owned and controlled the only market outlet that existed for sweet gas for light and fuel purposes, the result was that, unless these companies produced gas from their wells and leases ratably along with gas from the other wells and leases in the field, the only sweet gas that could be produced from the field would be produced through the wells of the pipe line companies. This was bound to and did result in very serious drainage of gas from the lands of the other operators in the sweet gas producing portions of the Panhandle gas field. For example, in the West Panhandle field approximately 145,000 sweet gas acres are owned by others than the pipe line companies withdrawing gas in that field. During this period approximately 56 wells were drilled by various operators on leases which they owned in the West Panhandle field, and many in the East Panhandle field. Yet, despite the fact that these

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[1]The corporate structure of the principal pipe lines operating in the Panhandle field is given in the **Report of the Federal Trade Commission to the Senate of the United States, 1936, Document 92, Part 84-A.** For Texoma Natural Gas Company and its affiliate, Natural Gas Pipe Line Company of America, see p. 255, 542. For Canadian River Gas Company, see p. 258, 544. For Panhandle Eastern Pipe Line Company, see p. 264-269. For Northern Natural Gas Corporation, see p. 263, 548. For Lone Star Gas Company, see p. 549. For Cities Service Gas Company, see p. 331, 529.

wells had been completed several years, were capable of producing sweet gas suitable for light and fuel uses, and the owners of same owned substantial quantities of land productive of such gas, the owners of 38 of such wells had never produced a single cubic foot of gas therefrom up to January, 1933. (R. 320. Exhibit 53, R. 548). Furthermore, during this period prior to 1933, the owners of these leases were subjected to serious and substantial drainage due to their inability to produce and dispose of any gas from their own leases. In a natural gas well the percentage of loss of gas is directly in proportion to the percentage in loss of reservoir or rock pressure (R. 324). As shown by Exhibit 53 (R. 548), the owners of the 38 developed leases which had produced no gas were subjected to a drainage which had resulted in an average loss of 14.74% of the gas which was originally under their leases.

It is true that during this same period much gas was being withdrawn from the Panhandle field through oil well production, and also through the production of sour gas wells. The record shows, however, (R. 320) that the pipe line companies in the West Panhandle field had by February 1, 1933, withdrawn in round figures 425 billion cubic feet of sweet gas from the sweet gas producing portions of the Panhandle field, and that others who owned sweet gas producing lands had at the same time produced no gas at all, or only inconsiderable amounts (R. 548), due to the fact that the pipe line companies owned and controlled the only outlets legally available for sweet gas.

Thus, during the period, 1929-1933, the pipe line

companies were producing as much gas as they wanted from their wells for light and fuel purposes, while the owners of some 200,000 acres of sweet gas producing lands were unable to produce and dispose of any gas from their wells. Efforts were made by the Legislature and by the Railroad Commission of Texas to find a solution for the problem, but, due to injunctions issued by the United States District Court, no relief was secured for the owners of the non-pipe line, sweet gas producing lands.[1] This condition resulted in serious drainage of gas from the lands of the non-connected owners of sweet gas producing lands.

(2) FROM 1933 TO AUGUST 1, 1935. In 1933 the Legislature of Texas undertook to relieve the condition in which the operators found themselves who owned producing gas lands, but who could secure no light and fuel outlet for same. A law was enacted, principally to relieve the condition which existed in the Panhandle gas field. The law was known as the "Sour Gas Law." It permitted the use of natural gas for any beneficial purpose, including the manufacture of natural gasoline, where the owner of a gas well could not secure a market for his gas for light and fuel purposes. (Appendix "D" of this Brief).

When this law was passed, many gasoline stripping plants and many carbon black plants were erected in the Panhandle gas field. The Texas law has always been that casinghead gas (gas produced from an oil

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[1]**Texoma Natural Gas Co. v. Railroad Commission**, 59 Fed. (2d) 750; **Texoma Natural Gas Co. v. Terrell**, 2 Fed. Supp. 168; **Canadian River Gas Co. v. Terrell**, 4 Fed. Supp. 222.

well along with the oil and taken from the well at the head of the casing) may be blown into the air. Under the provisions of the law passed in 1933, gas from gas wells could be stripped of gasoline content. and the residue blown into the air. It was practically a universal practice of the stripping plants to blow most of the residue gas into the air after they had extracted the natural gasoline content of the gas. Thus, where a daily average of 221,000 M. cubic feet of gas (being altogether casinghead gas) was blown into the air in the year 1932, the daily average had grown to 359,000 M. cubic feet in the year 1933; to an average of 863,000 M. cubic feet in 1934; and in 1935, prior to the effective date of House Bill No. 266, an average of more than one billion cubic feet of gas per day was blown into the air after its natural gasoline content had been extracted. (See Exhibit 55, R. 550).

This great increase of gas blown into the air was a result of the enactment of the 1933 law which had the effect in the Panhandle field of permitting natural gas to be used for either the manufacture of carbon black or for the extraction of its natural gasoline content, when no outlet was available for light and fuel purposes. The law had the effect of affording an outlet for their gas to many of the owners of the sweet gas producing lands who had theretofore been unable to produce any gas at all from their properties. At the same time, inasmuch as said producers were permitted under the law to produce up to 25% of the producing capacities of their wells, the owners of the wells connected to the gasoline plants and the carbon black plants could in many instances currently produce a

greater percentage of the producing capacities of their wells than could the pipe line companies who were producing their gas for light and fuel purposes. Once more some of the pipe line producers attacked the law, this time unsuccessfully.[1]

During this second period, from 1933 to August 1. 1935 (the effective date of House Bill No. 266), the number of gasoline plants constructed for the purpose of extracting the natural gasoline content of the natural gas, and the number of carbon black plants increased greatly, so that during the middle of the period there were 41 gasoline extraction plants in the Panhandle field, and 28 carbon black plants. (R. 321). A total of 1,395,128,978 M. cubic feet of gas was run to the gasoline plants from the period of February 1, 1933, to August 1, 1935, of which a total of 709 billion cubic feet of gas was blown into the air after the natural gasoline content had been extracted. (R. 321). It is true that much of this gas was sour gas, which is not usable in its natural state for light and fuel purposes, but much of it was sweet gas produced from the sweet gas producing portion of the Panhandle field. It was feared on the part of many that, if this enormous production of sweet gas were permitted to be continued for non-light and fuel uses, especially where the residue gas was blown into the air after the natural gasoline content was extracted, the Panhandle gas reservoir would soon be exhausted, endangering the welfare of those interested in the reservoir, as well as

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[1]**Sneed v. Phillips Petroleum Co.**, 76 F. (2d) 785. The record shows that this litigation was instigated and in part financed by Texoma Natural Gas Company. (R. 378).

that of towns, cities and industrial plants dependent upon said field for their supply of gas for light and fuel purposes. (R. 420, 365).

It is undoubtedly true that, during the period that stripping was permitted and this enormous quantity of gas each day was being blown into the air, those producers whose wells were connected to the gasoline extraction plants and to the carbon plants were producing a disproportionate and excessive amount of gas as compared to the current production of most of the pipe line companies. This reversed the situation which had existed during the period preceding the year 1933, when the pipe line producers were producing a disproportionate and excessive amount of gas as compared with those who had no outlet for light and fuel purposes.

The situation confronting the Legislature of Texas in 1935, therefore, was somewhat as follows: By the operation of the law which permitted the use of natural gas for any beneficial purpose, many producers who had theretofore had no outlet for their gas were able to produce and market a share of their gas by stripping operations, but this had the effect of permitting to be blown into the air each day more than one billion cubic feet of gas. This condition, if continued, was bound prematurely to exhaust the reservior, which in turn would be disastrous to both public and private interests. The pipe line producers were producing for light and fuel purposes only from their own wells. There were 34 sweet gas wells in the East Panhandle field which had no connection or outlet of any kind. (R. 509), and there were 29 sweet gas wells in the

West Panhandle field in the same situation. (R. 459). Thus, the rate of production on the part of those with gasoline plant and carbon black outlets was excessive and disproportionate as to most of the pipe line companies, and to those who had no connections at all; and the rate of production of the pipe line companies was excessive and disproportionate to those who were totally without an outlet for their gas. The pipe line producers, who owned and controlled the only market outlet for sweet gas for light and fuel purposes, were insisting that a law be passed which restricted the use of sweet gas to light and fuel uses. (R. 363-371). Since such pipe line producers constituted the only outlet for light and fuel purposes, it was bound to follow that, if a law should be passed which simply restricted the use of sweet gas to light and fuel uses, such a law would, in effect, dedicate all of the sweet gas producing portions of the Panhandle field to the pipe line companies. Indeed, the trial court has so found:

> "Plaintiffs and those companies similarly situated, being the pipe line companies which produce and transport gas from said field for light and fuel purposes, for all practical purposes at present constitute the only outlet in the field for sweet gas for the purpose permitted by the statute." (R. 187).

The Legislature knew, therefore, that unless provisions were inserted in the statute which would provide for a ratable and proportionate withdrawal of gas on the part of all who had developed acreage, the pipe line producers, being in entire control of the only outlet available for sweet gas for the purposes permitted by the statute, would be able to produce through their

own wells all of the sweet gas in the Panhandle field, although some 200,000 acres of sweet gas producing lands were owned by others, and although 301 of the 795 sweet gas wells in the Panhandle gas field were not owned by the pipe line producers. (R. 187).

The result just mentioned, an automatic monopoly in favor of the pipe line companies, was bound to follow, in the absence of some provision for ratable production on the part of all operators in the field. This was not a matter of conjecture, because the pipe line producers controlled the only outlet for the permitted purposes and, during the previous period of the field's history, when sweet gas was restricted to light and fuel use, operators who had no outlet for such purposes had been subjected to drainage amounting to 14.74% of their gas, while the pipe line companies were withdrawing 425 billion cubic feet of gas from their own wells. (R. 548, 320).

The solution provided for by the Legislature was a comprehensive one: First, House Bill No. 266, in effect, restricted the use of sweet gas to light and fuel uses, and prohibited its utilization in the manufacture of carbon black. Second, it permitted the manufacture of carbon black from sour gas which was not suitable for light and fuel uses without treatment for the removal of the sulphur content. Third, it prohibited the blowing into the air of the gas remaining after the extraction of the natural gasoline content of the gas. Fourth, it provided for a restriction of the total production from all sweet gas wells in a common reservoir to the reasonable market demand for sweet gas for light and fuel uses. And fifth, it provided for an allo-

cation of the total allowable among all the sweet gas wells in such common reservoir, so that the total production from all of such wells would be sufficient to supply the amount of gas for which there was a lawful demand.

3. **The conclusions of those conversant with the situation support the legislative solution as the only permanent remedy for existing evils.**

The legislative solution was not lightly arrived at. The Panhandle gas field has been a source of controversy in the state of Texas practically ever since the pipe line companies built into the field and commenced withdrawing the sweet gas therefrom only through their own wells. The reported cases in part reflect the variety, bitterness and complicated nature of that controversy.[1]

First, the Texas Legislature had already undertaken to deal with the situation by corrective legislation at four different sessions.[2]

Second, the Senate of the 43rd Legislature of Texas, Third Called Session (1934), appointed a committee

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[1]In addition to the cases listed in the foot note, p. 75, see **Sneed v. Phillips Petroleum Co.**, 76 Fed (2d) 785; **F. C. Henderson, Inc., v. Railroad Commission**, 56 Fed. (2d) 218; **Henderson Co. v. Thompson**, 14 Fed. Supp. 329; **Danciger Oil & Refining Co. v. Smith**, 4 Fed. Supp. 236.

[2]Acts 1931, 42nd Legislature, 1st Called Session, Ch. 28, Sections 8a and 8aa, p. 62, and Ch. 26, p. 46; Acts 1932, 42nd Legislature, 4th Called Session, Ch. 2, p. 3; Acts 1933, 43rd Legislature, Regular Session, Ch. 100, p. 222; Acts 1933, 43rd Legislature, 1st Called Session, Ch. 88, p. 229.

to make an investigation of the condition which existed in the field and to recommend remedies to the Legislature. This committee held exhaustive hearings and filed a report, together with recommendations, on September 9, 1934. (Exhibit 77, R. 387-392). This report concludes with the following language:

> "In closing this report, we deplore the large wastage of gas which now exists in the Panhandle oil and gas field, however, the conservation of a resource naturally necessitates control and usage of the production by the body entrusted with the regulation of such resource, in order to protect the various interests involved. We think it is safe to say that the so-called waste problem in the Panhandle gas field would have been solved long before this time if the provisions of Section 4 of the Oil and Gas Conservation Law had been carried out as the Legislature intended, all of which goes to show that conservation is impossible without an equitable allocation of the market requirements.
>
> "Unless the comprehensive legislative program herein outlined can be enacted and enforced, the State cannot continue its conservation policy." (R. 392).

Third, this Committee called on the Railroad Commission of Texas, the administrative body charged with the enforcement of the oil and gas conservation laws, for a report of conditions as the Railroad Commission had found them through its long experience in dealing with the problem, and for recommendations. The report of the Railroad Commission appears as Exhibit 78. (R. 393). It is too long to quote in full, but it contains an excellent summary of conditions. It was

the opinion of the Railroad Commission that no real solution could ever be found for the problem which existed in the Panhandle gas field unless some system were provided whereby all producers and owners of gas lands could be afforded an opportunity to produce a fair share of their gas ratably and proportionately along with the pipe line companies.

Fourth, the matter was investigated in 1934 by the Committee on Interstate and Foreign Commerce of the House of Representatives for the 73rd Congress, before which committee many witnesses testified while the committee was holding its hearings in Dallas, Texas.[1]

Among these witnesses was one H. M. Stalcup, Vice-President of Skelly Oil Company, an oil producer in the Panhandle field, who was presented to the Committee as a witness for the Panhandle Conservation Association, of which appellee, Texoma Natural Gas Company, was a member. (R. 402, 378). Mr. Stalcup gave to the Committee a rather complete history of operations in the field. (R. 402 to 420). He was asked for recommendations, suggesting, among other things:

> "3rd. The adoption by gas pipe line companies of a policy of ratable purchasing, and in the event such gas line companies do not voluntarily adopt such a policy, legislation to compel such ratable purchasing, to the end that all owners of sweet gas acreage be given their proportionate part of the available market for such gas." (R. 418).

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[1]Petroleum Investigation, Subcommittee of the Committee on Interstate and Foreign Commerce, House of Representatives, 73rd Congress (1934), Part 4, pp. 2209-2296.

Fifth, the matter of a solution for the problems which existed in the Panhandle gas field had very much concerned the public of Texas for a long period prior to the enactment of House Bill No. 266. Conservation associations were organized soon after the enactment of the law which permitted the stripping operations already detailed, and these associations were sponsored principally by the pipe line companies, including Texoma Natural Gas Company, appellee herein. These associations caused advertisements to be placed in newspapers throughout Texas, circulars and printed data of various kinds were disseminated, radio talks were sponsored,—all for the purpose of creating in the minds of the public a feeling of concern on account of the conditions which obtained, and to bring about a public demand for a legislative solution of the problem. (R. 362).

Sixth, about half of the members of the 44th Legislature which was to convene January, 1935, visited the Panhandle gas field in 1934, and made personal investigations of the conditions there. (R. 368).

Seventh, the 44th Legislature of Texas, which enacted the legislation under attack, considered the problem for many months before House Bill No. 266 was adopted. This Legislature convened the first week in January, 1935, and it was not until May 1, 1935, that House Bill No. 266 was finally passed. During this time the appropriate committees of both the House of Representatives and the Senate held extended hearings for many weeks, allowing all interested persons to appear and present their views. The record shows that the 44th Legislature considered this matter more seri-

ously than it did any other matter before the Legislature. (R. 373).

In the light of all these matters, it may safely be said that no problem of public interest has been so seriously and carefully considered by the Legislature of Texas as has the matter of working out a proper solution of the problems which existed in the gas fields of Texas, exemplified by the Panhandle gas field. Surely it must be conceded that it was a matter with which the people of Texas had a right to be concerned. And if the matter were otherwise in doubt, great weight must necessarily be accorded to the solution which the Legislature deemed it necessary to adopt to work out somehow a fair adjustment of the whole matter, and at the same time to protect the rights of all of those concerned with the problem. Every Legislature, every administrative body, those in the industry who are interested in a fair solution of the problem, all unite in two conclusions: first, that the use of sweet gas should be restricted to light and fuel uses; second, that some system of ratable production must be established so that the rights of all owners in the common reservoir may be protected. This unanimity of solution must have weight of real magnitude.

The Federal Trade Commission in 1935 conducted an investigation of conditions and problems in the natural gas business, pursuant to Senate Resolution No. 83 of the 70th Congress, 1st Session. See *Final Report of the Federal Trade Commission to the Senate of the United States on Economic, Corporate, Operating, and Financial Phases of the Natural Gas Producing, Pipe-Line and Utility Industries, with Con-*

clusions and Recommendations, Document 92, Part 84-A (1936). The following is quoted from the report:

"Without adequate ratable taking or purchase laws, or an unitized operation in the field, the pipe lines have power to make or break at will any independent producer who is without pipe-line affiliations or facilities, or does not engage in local, usually wasteful, processing." (pp. 590-591).

"Ratable taking would provide the independent producer with an equitable share in the sale of whatever gas the market may be absorbing. It would consequently remove his complaint that gas is being drained from under his holdings without compensation by pipe-line interests controlling the market outlets and refusing to purchase. The State of Texas found that waste which was very largely eradicated under its ratable-taking law returned and continued when the law was held unconstitutional by a lower Federal Court. If this principle of legislation, or that of unitized operation, is not ultimately put into effect the independent producer faces a situation where he must dispose of his property to buyers who have their own gas reserves to draw from and who in that process can also drain the gas from under independents' acreage." (p. 605).

"The pipe-line companies have been leaders in advertising the almost incredible amount of wastage and in urging its eradication by direct legislative enactment. It is apparent that their attitude is not wholly unselfish. While the gas would be thereby conserved, it would also extend the life of their own reserves and lengthen the period during which they may drain from under independent holdings. The situation is one in which it ap-

pears that the immediate financial benefits of such legislation would go largely to the private interests which control the only available market outlets." (pp. 605-606).

"* * * If the pipe-line interests have adequate gas production of their own and neglect or refuse to take that of independent producers, the independents must either find some other use for their gas, without transportation, or they may see their gas taken by drainage to an extent that will depend upon the porosity of the gas-bearing geologic structure. The interspersion of independent holdings with those of large pipe-line and utility interests under such circumstances has been, and still continues to be, an underlying cause both of large physical and economic waste of natural gas and frequently of unfair damage to both large and small producers." (p. 583).

"The public interest in natural gas as an exhaustible natural resource must be weighed against the currently accepted theory of ownership of gas in place, and of gas recovered, and the rights of gas owners to use or dispose of gas recovered as they see fit. * * * As a whole, the question of conservation and prevention of waste of natural gas therefore, involves an extremely complicated and difficult situation, any satisfactory solution of which requires impartial weighing of private rights and equities and public interest. Its importance from the angles of both public and private interest, however, is such as to indicate that, although much has been done to limit wastage, a still more complete and equitable solution than any hitherto attained is desirable." (pp. 101, 102).

Thus it may be seen that the Federal Trade Com-

mission has added its weight to the conclusion that there can be no fair solution of the problems arising in commonly owned gas reserves except by some system of ratable production.

In the light of all these facts, it cannot be said that the Legislature of Texas acted arbitrarily or capriciously when it incorporated a ratable production feature in House Bill No. 266.[1]

A somewhat analogous situation was considered in *Assigned Car Cases*, 274 U. S. 564, 71 L. ed. 1204, 47 S. Ct. 727. This case involved an order of the Interstate Commerce Commission governing the distribution of cars among bituminous coal mines in times of car-shortage. The order prohibited any carrier from placing for loading at any coal mine more than that mine's ratable share of all cars, including assigned cars, available for use in the district, requiring that, in determining how many cars were available in the district, the carrier placing the cars should count all cars, including those owned by it, those owned by foreign railroads and assigned for their fuel service, and likewise those owned by private shippers and assigned for

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[1]Other states which have provided for a system of ratable production in natural gas fields include **Louisiana** (Dart's Louisiana Statutes 1932, Sec. 4784), **Michigan** (Compiled Laws, Sec. 11639), **Oklahoma** (Harlow's Statutes of 1931, Sec. 11536), **Arkansas** (Acts 1933, Sec. 8), and **Mississippi** (General Laws, Ch. 117, Sec. 9).

The Oklahoma law which provides for ratable takings in gas fields was sustained by the Supreme Court of Oklahoma in **Oklahoma Natural Gas Co. v. State**, 161 Okl. 104, 17 Pac. (2) 488.

their service. The effect of the rule was illustrated by Mr. Justice Brandeis as follows:

> "The operation of the uniform rule may be illustrated by the following example: Assume that there are in the district 10 mines each with the rating, or capacity, of 20 cars a day; that of the 200 cars needed to fill the district's requirement only 100 cars are available on a particular day; and that of the 100, only 85 are owned by the railroad, the remaining 15 being owned by mine A. Under the rule, the share of each mine would be 10 cars. Mine A would be permitted to have placed its own cars, but only 10 of them. If, on the other hand, 95 of the 100 cars had been owned by the carrier, and only 5 by mine A, there would be placed at its mine, in addition to its own 5 cars, 5 of the carrier's so-called "system cars". The rule does not divert the surplus of cars owned by one shipper to use by another. It merely puts a restriction upon the use of the private car by limiting the number of the so-called assigned cars which may be placed at a particular mine at a particular time. The owner may use the surplus elsewhere. Or he may lease the surplus cars to the carrier or to another shipper. The operation of the rule upon assigned railroad fuel cars is precisely similar. The limitation is imposed in order to improve the service and to prevent any mine (including one operated by a railroad) from securing, at the particular time, more than its ratable share of the aggregate available coal transportation facilities." (274 U. S. 573).

The court held that there was no constitutional obstacle to the enforcement of the rule, and that, in view of the fact situation with which the Interstate Commerce Commission was confronted, the rule was

entirely fair and reasonable, even though it prevented a mine or carrier from putting to its own use cars which it owned.[1]

It will be noted that the rule of the Interstate Commerce Commission did not divert the surplus of cars owned by one shipper to the use of another, nor did it require one shipper against his will to lease his surplus cars to another, but it did prevent one shipper from using more than his ratable share of all the cars available in times of car shortage. Similarly, House Bill No. 266 does not undertake to divert the markets or facilities owned by the pipe line producers to the other producers in any gas field. It provides that each producer shall not produce more than his ratable

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[1]For a similar case, see **United States v. New River Co.**, 265 U. S. 533, 68 L. ed. 1165, 44 S. Ct. 610.

The far reaching effect of the decision in the Assigned Car Cases is further emphasized by the language of **Chicago, etc.. Ry. Co. v. United States**, 284, U.S. 70, 76 L. ed. 177, 52 S. Ct. 87, where it is said: "Confiscation may result from a taking of the use of property without compensation quite as well as from the taking of the title. Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 458, 10 S. Ct. 462, 33 L. ed. 970; Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362, 410, 412, 14 S. Ct. 1047, 38 L. ed. 1014; Chicago, Mil. & St. P. R. Co. v. Wisconsin, 238 U. S. 491, 498, 499, 35 S. Ct. 869, 59 L. ed. 1423, L.R.A. 1916A, 1133. The use of railroad property is subject to public regulation, but a regulation which is so arbitrary and unreasonable as to become an infringement upon the right of ownership constitutes a violation of the due process of law clause of the Fifth Amendment. Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 20, 27 S. Ct. 585, 51 L. ed. 933, 11 Ann. Cas. 398." (284 U. S. 96).

share of all gas produced from the field, and it goes no further than to set up a system of ratable production. If it was reasonable for the Interstate Commerce Commission to prevent an unratable use of coal cars, regardless of their ownership, in a situation where even if no cars were available, no mine owner would lose any of the coal which he owned, surely it must be apparent that the Legislature of Texas acted reasonably when it provided for a system of ratable production in gas fields owned in common, when it is obvious that in the absence of such a system, one group of operators will inevitably withdraw gas belonging to others.

4. Absent ratable production disproportionate withdrawals on the part of appellees and others will continue.

The validity of a program of proration is not dependent upon the presence of a provision taking into account past withdrawals; otherwise, no program of proration could be applied to a field already partially or completely developed, since under any development, absent ratable production, many gross inequalities have resulted. Many wells have produced amounts disproportionate to the amounts produced by wells having market connections and to others without such connections. Many operators who had and have no connections for light and fuel use have produced gas disproportionately for use in gasoline stripping plants. Such production and such uses were wholly legitimate under the unregulated rule of capture and the statutes then existing, however inequitable they may have been in results.

The legislative remedy must be applied to the con-

ditions actually existing. Whether appellees have drained the gas of their neighbors, or whether their neighbors have drained the gas of appellees is relevant only as showing the condition which the Legislature sought to remedy.

We, therefore, do not regard it as material whether these particular appellees have in the past taken more than their fair share of the gas from the reservoir. It is sufficient that a condition of disproportionate withdrawals did exist, a condition which demanded legislative treatment for the protection of the correlative rights of all the owners of the common fund. In view, however, of appellees' contentions to the contrary, we deem it appropriate to discuss briefly the record in this aspect.

First, the record as to appellee Consolidated Gas Utilities Corporation. This company operates exclusively in the East Panhandle field. It owns 8,773.53 acres of leases in the sweet gas producing portions of the East Panhandle field, and in addition owns 1,500 acres of leases in Collingsworth County. Collingsworth County is not a part of the Panhandle gas field according to the Railroad Commission's definition of same, and there is not a single gas well that is producing gas in Collingsworth County in commercial quantities. (R. 245).

Consolidated Gas Utilities Corporation owns 12 producing wells on 1,473.53 acres. (R. 240). This company's geologist, Camp, testified that down to December 31, 1935, a total of 45,214,776,000 cubic feet of gas had been produced from the 12 wells owned

by Consolidated Gas Utilities Corporation, and that the per-acre production from these 12 wells, taking into account the amount of acreage on which they were located amounted to 30,620,000 cubic feet. (R. 239). These figures are impressive. Camp testified further as follows:

> "We have already taken from our developed acres more than three times the average original reserve per acre in the field * * *." (R. 246).

Camp also testified (R. 246) that the amount accepted as the average quantity of gas originally in the reservoir in the Panhandle gas field was from 16 to 17 million cubic feet per acre. Accepting his top figure as to the original amount of gas in place, let us analyze the effect of the Consolidated Corporation's production.

On the leases of the Consolidated Corporation's 1470 odd developed acres, there were originally in place 25,150,000,000 cubic feet. Yet the production has been more than 45 billion cubic feet of gas. But this is not all. As shown by Exhibit 60 (R. 553), the developed leases of the Consolidated Corporation's still have 62.6% of their original rock pressure, which means they have 62.6% of the original gas reserve still in place under the leases. Consolidated, therefore, still has in place under its developed leases more than 15 billion cubic feet of gas. Adding its present reserve to the amount of gas it has produced from its leases, we find that it now has, and has produced, a total of 60 billion cubic feet of gas from its 12 wells, as against an original reserve in place of only 25 billion.

This shows that Consolidated Corporation has drained in round figures 35 billion cubic feet of gas from others.

Furthermore, the Consolidated Corporation is producing 25,000,000 cubic feet of gas per day out of a total of 181,174,000 cubic feet for which there is an outlet from the East Panhandle field. In other words, with 3.7% of the wells and 4.8% of the acreage, it is now producing 13.8% of the total gas produced, in spite of the fact that it has already drained 35 billion cubic feet from the lands of others.

Exhibit 24 (R. 500), prepared by the witness Camp, shows plainly the excessive and disproportionate withdrawals that have been indulged in by certain operators, as compared with others in the East Panhandle field. For example, Lone Star Gas Company, one of the first pipe line companies to build into the field, had withdrawn an average of 3,451,000 cubic feet per acre from developed leases aggregating 14,528 acres, whereas Consolidated Corporation (formerly Texas Panhandle Gas Company) has produced an average of 30,620,00 cubic feet per acre from less than 1500 acres. This exhibit also shows that the average production for the pipe line companies operating in the East Panhandle field has been 8,116,000[1] cubic feet per acre, as compared to

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[1]This high average is attributable to the operations of three companies, Consolidated Gas, Northern Texas, 23,189 M.C.F. per acre and Public Service Corporation, 22,589 M.C.F. per acre. (R. 241,500). Only one producer in the field has exceeded appellee, Consolidated Gas in withdrawals per acre from developed acreage. (R. 500).

16,662,000 per acre for the gasoline plants operated in said field. This clearly shows that during the time that stripping was permitted the average production in the East Panhandle field was excessive on the part of the gasoline extraction plants, or the owners of wells connected thereto, but it also shows that this particular appellee, Consolidated Corporation, was more than able to take care of itself in the fight to produce as much gas as possible from the reservoir, in that its average production per acre (30,620,000) is practically twice that of the average production per acre of the gasoline plants.

It is, of course, not the purpose of House Bill No. 266 to undertake to penalize any operator on account of an excessive amount of gas lawfully produced before the law went into effect. Under the preexisting gas law, any operator could produce up to 25% of the producing capacity of his well or wells for lawful purposes, regardless of the effect on others producing from the common reservoir. From that standpoint Consolidated Corporation was entirely within its rights when it produced such enormous quantities of gas. The same thing is true of all other operators withdrawing gas from the Panhandle gas field. These figures are important, however, for the purpose of showing that a condition of disproportionate, excessive and unequal withdrawals did exist in the Panhandle gas field on the part of certain operators, as compared with others, and that this situation demanded and justified the legislative treatment which it received.

As the owner of whatever amount of gas is under its leases, Consolidated Gas Utilities Corporation is

entitled to produce its fair share of the total gas that is permitted to be produced from the reservoir. But we do insist that, legislative attention having been given to the problem, there is no principle of constitutional law which requires the State of Texas to sit idly by and permit Consolidated Gas Utilities Corporation, or any other company, to produce hereafter two or three times as much gas as is now in place under its acreage, to the detriment of other owners of the surface, who are likewise entitled to produce gas from the common reservoir.

Next, let us see the record of appellee, Texoma Natural Gas Company. This company operates in the West Panhandle field. It owns 90 producing gas wells located in Carson, Gray, Hutchinson and Moore Counties, Texas. The details of the production from these wells, their present rock pressure, and the number of acres in the leases on which they are located, are given in Exhibit 3. (R. 442).

Texoma, by its witnesses, Peterson (R. 219) and Hughes (R. 225), undertook to show that the average per-acre production of the pipe line companies in the Panhandle field has been much less than the average per-acre production of others in the field, who, in the last two years, have produced their gas for other purposes. For example, they show in Exhibit 3 (R. 439) that the average per-acre production of the pipe line companies has been 1,157,000 cubic feet as compared with an average of 13,900,000 cubic feet for sweet gas wells not owned by, or connected to, gas pipe line companies. (R. 459). Naturally the production from the wells of the second class was entirely during the

period beginning with the sour gas law (1933) since they, for the most part, could not produce at all prior to that time. (R. 548).

These figures undoubtedly show that disproportionate production was occurring in favor of one class of producers and against another class. They do not show that no pipe line producer has itself drained gas from others. This can only be determined when the amount of gas the particular pipe line producer originally had in place is compared with the total of what it now has in place plus what it has produced.

Texoma Natural Gas Company did not enter the West Panhandle gas field until August, 1931. (R. 375). At that time it purchased 69 gas wells. Naturally the Panhandle field had been under production for several years, and substantial quantities of gas had already been produced. In fact, out of 14,986,752,696,000 cubic feet originally in place in the West Panhandle field (R. 176), 2,020,016,692,000 cubic feet had already been produced in August, 1931. (R. 319). This is 13.6% of the total gas originally in place. The original or virgin rock pressure in the Panhandle gas field was 430 pounds; but, since gas had already been produced from the leases and wells bought by Texoma Natural Gas Company before it came into the field in 1931, and from the field generally, these pressures had been reduced in proportion to the percentage of the original amount of gas which had been withdrawn from the leases prior to the time that Texoma acquired them. (R. 324).

If the original per-acre reserve of natural gas under

the Texoma leases be known, if the rock pressure at the time Texoma acquired the leases be known, if the amount of gas produced from the leases by Texoma after it acquired the leases be known, and if the present rock pressure of the leases be known, it is an easy matter to calculate whether Texoma has produced a disproportionate amount of gas from the reservoir, or has drained gas from other leases; or whether, on the other hand, Texoma has been subjected to drainage by the operation of other producers. (R. 324).

Fortunately, there are sufficient data in the record to permit a fair analysis of the situation as to Texoma Natural Gas Company:

(1) C. J. Peterson, Chief Geologist for Texoma Natural Gas Company, testified as follows:

> "The original gas reserves under the lands owned by the Texoma in the West Panhandle field was around 14 or 15 million cubic feet per acre." (R. 224).

Accepting the figure of Texoma's own Chief Geologist, we know the original per-acre reserve under Texoma's leases at the time the Panhandle gas field was discovered.

(2) Peterson's Exhibit 3 (R. 442-447) lists the total production by Texoma through July, 1935, from all of the wells owned by Texoma in the West Panhandle field, together with their rock pressures as of July, 1935.

(3) J. G. Dickinson, Superintendent of Production of Texoma Natural Gas Company (R. 375), listed the

69 wells purchased by Texoma Natural Gas Company in August, 1931, together with their rock pressures at or near that time.

Of the 69 wells listed by Mr. Dickinson as having been acquired by Texoma in 1931, at least 21 of them (R. 504, 505, 515, 524) are located in the East Panhandle field, and Texoma does not produce the gas therefrom into its own lines; and it is not attacking the order of the Commission as to the East Panhandle field. Eight of these East Panhandle wells have been connected to the lines of Lone Star Gas Company, and the rest of them have been connected to the Coltexo gasoline stripping plant. As to certain of the other wells listed by Mr. Dickinson as having been acquired by purchase in 1931, Texoma did not have a record of the rock pressure of the well at the time it was purchased having only the working pressure, and the calculation under discussion cannot be made in the absence of knowledge as to the rock pressure of the well at the time Texoma purchased same. (R. 323). Eliminating these wells, therefore, we have left 33 wells in the West Panhandle field which were acquired by Texoma Natural Gas Company in August, 1931. This is more than one-third of all the wells which it now owns in the West Panhandle field.

Let us take one well to illustrate the process of calculation. According to Exhibit 3 (R. 442), the N. A. Cobb 1-T is located on 100 acres of land, has a present rock pressure of 269 pounds, and Texoma has produced from same a total of 1,170,224,000 cubic feet of natural gas. Its rock pressure when Texoma acquired this lease was 367 pounds. (R 375). Accepting

Mr. Peterson's figure of an original per-acre reserve of 14 to 15 million cubic feet (R. 224), and taking the higher figure, we find that there were originally in place under this lease 1,500,000,000 cubic feet of natural gas. Since only 367 pounds of the virgin pressure of 430 pounds existed when Texoma acquired the lease, the rock pressure at that time was 85.3% of the original rock pressure, which means that 85.3% of the original reserve of gas was in place when Texoma acquired the lease (R. 324). 85.3% of 1,500,000,000 cubic feet is 1,275,000,000 cubic feet. Exhibit 3 shows that Texoma itself has produced a total of 1,170,224,000 cubic feet from this lease, and that its rock pressure as of July, 1935, was 269 pounds, so that 62.6% of the virgin pressure of 430 pounds still remained at that time. 62.6% of 1,500,000,000 cubic feet is 941,000,000 cubic feet, which represents the amount of gas still in place under the lease as of July, 1935. Adding the amount of gas in place July, 1935, to the total amount of gas produced by Texoma Natural Gas Company, we have a total of 2,111,224,000 cubic feet either produced by Texoma or still in place under the lease in July, 1935. But there were not in excess of 1,275,000,000 cubic feet in place under the lease when Texoma acquired same. Deducting this figure from the total either produced by Texoma or still in place under the lease, we have a remainder of 836,224,000 cubic feet; and that figure shows the amount of gas which Texoma has drained from other leases in its production of gas from the lease under discussion.

Applying this same process to the 33 leases and wells which were originally acquired by Texoma in the West Panhandle field, the tabulation is as follows:[1]

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[1]A similar calculation was introduced in the trial court (R 552-A), but this calculation was criticized by Texoma's attorneys for the reason that a maximum of 640 acres was allocated to each lease, since that was the maximum drainage area as found by the Railroad Commission. Also, in said exhibit, an assumption of an original reserve of 20 million cubic feet, per acre was made, since at the time the calculation was made it was not known what the Texoma witnesses claimed was the original reserve under their leases. To obviate the objection that in the calculations Texoma was not being given the benefit of the amount of acreage actually held by the lease on which the well was situated, we have, in the calculation above set forth, accepted the figures which appear in Exhibit 3 (R. 442) as to the amount of acreage under the lease, regardless of the fact that in many instances such acreage is in excess of the reasonable drainage area of a well as found by the Railroad Commission. We have also accepted the testimony of Mr. Peterson to the effect that the original per-acre reserve of the Texoma leases was 14 to 15 million cubic feet, and have given Texoma the benefit of the higher figure.

Lease and Well	Acres held by Well	M.C.F. of gas originally in place	M.C.F. of gas in place when Texoma purchased	M.C.F. of gas produced by Texoma through July 1935	M.C.F. of gas gas in place July 1935	M.C.F. of gas drained to lease	M.C.F. of gas drained from lease
CARSON COUNTY							
N. A. Cobb 1-T	100	1,500,000	1,275,000	1,170,224	941,000	836,224	
Garner A-2-T	320	4,800,000	4,017,600	2,098,074	3,235,000	2,098,074	
Noel 1-T	160	2,400,000	2,265,600	635,427	2,022,800	392,627	
Bednorz 1-T	100	1,500,000	1,445,000	568,280	1,318,500	441,780	
Crutchfield 1-T	1760	26,400,000	25,513,600	3,013,404	23,892,000	505,404	
Jordan 1-E	160	2,400,000	1,975,200	780,425	1,557,600	363,225	
McConnell 1-E	80	1,200,000	1,016,400	873,241	694,800	551,641	
S. B. Burnett 1-G	1360	20,400,000	15,565,400	1,334,872	13,423,200		807,328
S. B. Burnett 11-G	1360	20,400,000	15,646,800	183,119	12,566,400		2,897,381
S. B. Burnett 19-G	1360	20,400,000	15,426,400	589,299	12,097,200		2,739,901
Burnett Estate 1-G	320	4,800,000	4,080,000	502,445	3,528,000		49,555
Burnett Estate B-1-G	160	2,400,000	2,354,400	2,122,607	2,256,000	2,024,207	
Burnett Estate C-1-G	160	2,400,000	2,361,600	2,793,211	2,215,200	2,646,811	
W. E. Cobb 1-G	160	2,400,000	2,361,600	1,711,563	1,444,800	794,763	
Ledrick 1-S	240	3,600,000	3,416,400	639,018	2,998,800	221,418	
M. C. Burnett 1-T	880	13,200,000	11,008,800	739,746	9,358,800		910,254
M. C. Burnett 5-T	880	13,200,000	11,232,200	1,401,110	9,332,400		498,690

GRAY COUNTY							
Cantrell 1-E	160	2,400,000	2,016,00	617,776	1,567,200	168,976	
Frashier 1-E	300	4,500,000	3,901,500	1,305,147	2,889,000	292,647	
McCullough 1-E	127.9	1,918,500	1,649,910	647,102	1,316,091	313,283	
Roscoe 1-E	80	1,200,000	975,600	519,635	795,600	339,635	
Wall 1-E or 3-E	80	1,200,000	975,600	995,341	697,200	716,941	
H. M. Barrett 1-G	160	2,400,000	2,064,000	1,500,304	1,680,000	1,116,301	
Bradford 1-S	320	4,800,000	3,326,400	114,887	1,351,200		1,860,313
Bell B-1-E	80	1,200,000	984,000	524,963	804,000	344,963	
HUTCHINSON COUNTY							
Johnson A-1-G	640	9,600,000	8,736,000	1,896,114	7,833,600	993,714	
Sanford B-1-G	160	2,400,000	1,567,200	22,611	1,144,800		399,789
MOORE COUNTY							
Kilgore 1-G	831	12,465,000	12,290,490	446,502	12,140,910	296,922	
Kilgore 2-G	831	12,465,000	12,377,745	1,072,285	11,942,270	634,810	
Dore 1-G	640	9,600,000	9,417,600	912,021	9,379,200	873,621	
Taylor 1-P	320	4,800,000	4,776,000	411,574	4,723,200	358,774	
Sneed 1-P	2000	30,000,000	28,470,000	1,062,774	25,800,000		1,607,772
Jester 1-T	240	3,600,000	3,556,800	539,307	3,524,400	506,907	
					TOTALS	17,833,668	11,770,983

The result of these calculations is that when the production from more than one-third of the total number of wells owned by Texoma Natural Gas Company in the West Panhandle field is taken into account, Texoma itself has been guilty of disproportionate withdrawals, in that it has drained 6,052,685,000 cubic feet of gas from other leases since August, 1931.[1]

It will be noted that the wells considered are in every county in which the Texoma owns wells, and that the number considered is representative as shown by the following tabulation:

	Total Owned	Considered in Tabulation
Carson County	46 producing wells	17
Gray County	14 producing wells	8
Hutchinson Co.	7 producing wells	2
Moore County	20 producing wells	6

It should further be remembered that the wells set forth in the above calculation were not deliberately chosen from a group of available wells. They constitute all the wells which were originally purchased by Texoma Natural Gas Company when it first began operations on which the necessary information exists, the rest of the wells owned by Texoma in the West Panhandle field having been drilled since that time

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[1]The above calculation is made on an assumed virgin pressure of 430 pounds. If the calculation be made on absolute rock pressure of 443 pounds (atmospheric pressure being 13 pounds) Texoma is shown to have drained 6,738,645,000 cubic feet of gas from other leases in the operation of its 33 wells.

Since the record does not show the rock pressure of the various other wells drilled by Texoma after August, 1931 there is no way to make any calculation except with respect to the 33 wells, of which the record gives complete information. The witness, Massa, testified, however, that the number of wells and leases which were available for this calculation were sufficiently representative of the holdings of Texoma Natural Gas Company to show the general condition of its entire holdings throughout the Panhandle field. (R. 325).

The trial court assigned to appellee Texoma developed leases, 81,928.44 acres, total production, 98,808,489,000 cubic feet, an average of 1,312,000 cubic feet per acre. To the 180 sweet gas wells not connected to pipe lines it assigned 30,096 acres, production 418,652,466,000 cubic feet, or an average of 13,900,000 cubic feet per acre. (R. 177). These acreage figures are arbitrary to the extent that the leases surrounding the Texoma's wells are larger than the leases of others, and the division between leases, usually a fence line or other surface division, has no relation whatsoever to the drainage area of the well located on such lease. Texoma's total acreage is 198,200 acres of which 81,928 acres are assigned to Texoma as "developed." The total sweet acreage in the West field is estimated at 723,000 acres,[1] of which the pipe lines own approximately 80% and non-pipe line owners 20%. To non-connected producers 30,096 acres are

[1]Complainant's witness Don Hughes. (R. 227). This estimate is most conservative and is lower than the acreage estimate by the Railroad Commission engineers and others.

assigned as "developed." The Court, therefore, in comparing the acreage production as between Texoma and unconnected producers in the West field credits Texoma with approximately 40% of its total acreage, while only crediting unconnected producers with approximately 20% of their total acreage.[1] An even greater disparity is apparent in the comparison with sour gas production. (R. 177). While the sour gas area contains 270,000 acres,[2] 33,700 acres are assigned to the sour gas area as "developed," or 12½% of the total sour gas acreage. Many of these wells were not drilled on the same spacing as gas wells, but were drilled as oil wells on a spacing rule of 10 acres per well. The court's findings as to production from Texoma's properties (R.177) wholly ignores all production prior to their acquisition by Texoma.[3]

In Exhibits 3 and 16 (R. 439, 458) appellees undertook to lump together all of the production of the pipe line companies on the one hand, and the production to the gasoline plants, etc., on the other. These calculations show that the per-acre production of the pipe line companies on an average is less than that of the wells heretofore connected to the gasoline extraction plants. These figures simply sustain the position of the State that a system of disproportionate and excessive production has existed in the Panhandle gas

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[1]The Court's finding of fact follows the complainants' Exhibit #6.

[2]Complainants' witness Hughes. (R. 227).

[3]This production is also ignored by the court in finding that Texoma with 20% of the total reserves had produced only 2.25% of the withdrawals from the West field. (R. 176).

field which justifies legislative treatment. If it were the intention of Texoma Natural Gas Company, however, to attempt to show by these figures that all the pipe line producers have been subjected to serious drainage on account of the production of the wells connected to the gasoline plants, not enough was proved by appellees. Comparative figures showing per-acre recovery are absolutely meaningless from a drainage standpoint, unless the figures also show the total reserve of gas at the time the leases in question were acquired, and their present reserve, and these matters are considered along with their total production.

As already demonstrated, an analysis of the production figures with reference to Texoma Natural Gas Company itself, shows that it has drained more than .6 billion cubic feet of gas from others by the operation of 33 wells.

The field must, of course, be viewed as a whole and not with reference to the condition of any particular producer. *Champlin Refining Co. v. Corporation Commission*, 286 U. S. 210, 76 L. ed. 1062, 52 S. Ct. 559. The record shows (R. 441) that there are 293 sweet gas wells in the West Panhandle field which are owned by those who control the only outlet for light and fuel purposes, that is, the pipe line producers. There are 180 sweet gas wells in the West Panhandle field not owned by, or connected to, the gas pipe line producers (R. 459); and since, as the trial court has found (R. 187), the pipe line companies are the only outlet available for light and fuel purposes, and since House Bill No. 266 restricts sweet gas to such uses, those who own the leases on which these

180 wells are situated will not be able to produce any gas from their leases, unless ratable production is enforced. Further, there are 29 sweet gas wells in the West Panhandle field (R. 459) which, although capable of producing same, through lack of an outlet, have never produced any gas at all.

The situation is the same in the East Panhandle field. Out of a total of 321 sweet gas wells in the East Panhandle field, 139 wells located on sweet gas producing lands do not have any outlet for light and fuel purposes. (R. 509). There are 64 sweet gas wells in Wheeler County, Texas, belonging to 34 different owners, for which there is no outlet for light and fuel purposes, and 18 of these wells have never had any outlet for any purpose. (R. 512). Similarly, there are 75 wells in eastern Gray County, a part of the East Panhandle field, which do not have any outlet for light and fuel purposes, which wells belong to 31 different owners, and, of these, 16 sweet gas wells have never had a connection for any purpose. (R. 515).

What is to be done with the gas in place owned by these many operators in the Panhandle gas field other than the gas pipe line companies which control exclusively the only outlet available for the use of sweet gas for the purposes permitted by the statute? The record shows that all the light and fuel markets within nine hundred miles of the Panhandle gas field have already been supplied. (R. 363, and see footnote on page 29 ante).

An inspection of the map showing the natural gas pipe line systems of the United States (original exhibit

61: *Report of Federal Trade Commission, Document 92, Part 84-A*, p. 24) shows the far-reaching character of the lines now emanating from the Panhandle field, and that all territories which could be supplied with Panhandle gas are already serviced with lines in existence. A duplication of lines now laid would be foolhardy even if the financing of new lines to points nine hundred miles from the Panhandle were within the reach of the average gas producer. On this point it should be noted that Natural Gas Pipe Line Company of America, affiliated with Texoma Natural Gas Company, has invested more than $25,000,000.00 in the construction of a line about nine hundred miles long. Is it any answer to the many surface owners in the Panhandle gas field to say that in order to produce a fair share of gas from the field they must build pipe lines with money they do not have to transport their gas to markets which do not exist?[1]

There is no dispute that the gas pipe line producers already own and control the only outlet available for light and fuel purposes, and hence they enjoy a monopoly on the use for which sweet gas is permitted. If the present restrictions on use of such gas be continued. and the ratable production features of the law be rendered ineffective, it is inevitable that all the sweet gas which is produced in the Panhandle field, including the gas now under the leases and lands of other operators,

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[1]As to the possibility of any independently financed pipe line being able to build into territory into which lines now extend and secure a market outlet, see discussion in Report of Federal Trade Commission, Document 92, Part 84-A, pp. 593-597.

will eventually be produced from wells belonging to the appellees and those similarly situated.

Is there no solution of the problem which exists in this enormous gas field other than one which, in itself, is bound to result in disproportionate withdrawals on the part of some and the infringement on the rights of others? We have no hesitancy in asserting that during the period from 1933 to August 1, 1935, (the effective date of House Bill No. 266), the system then in force was harmful to the interests of the pipe line producers. To correct that situation, can it be said that there is no alternative other than for the Legislature to go back to the inequitable situation which existed prior to 1933, when the pipe line producers alone were in a position to produce gas from a reservoir which they own in common with others?

When it is considered that several Legislatures of Texas, the Railroad Commission of Texas, and the Federal Trade Commission, have all made investigations of the problem, and have all reached the conclusion that there can be no effective solution of the problem without a system of ratable production, we see no answer to the statement that the Legislature acted reasonably when it provided for such a system. If the remedy adopted was reasonably calculated to offer a fair solution to the problem at hand, the Legislature must have its way.

We are concerned with whether the statute and orders promulgated thereunder have a reasonable relation to the protection of correlative rights—mutual interests of owners of a common property or fund. The

exercise of those rights are peculiarly subject to the principle and qualification that the use of such property shall not be to the prejudice of the rights of others. The unequal withdrawals in the Panhandle field were accomplished under the unregulated conditions prevailing in the industry, and whether an operator's production was for the use of a pipe line or a gas stripping plant, it was affected under existing property rights and statutory provisions. Such conditions gave rise to "almost continual litigation and turmoil of a conflicting and changing character".

It is idle to assert that the conditions of disproportionate withdrawals existing in the Panhandle field resulted from an adoption of an improvident public policy on the part of the Legislature, because such argument in no manner detracts from the power or right of the Legislature to remedy such condition whatever its origin, and the argument is not made any stronger by quarreling with the public policy expressed by the legislative branch of the government. *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 S. Ct. 273; *Otis & Gasman v. Parker*, 187 U. S. 606, 47 L. ed. 323, 23 S. Ct. 168; *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. ed. 253, 8 S. Ct. 992. It should be sufficient to say that such conditions constituted a very serious problem from the standpoint of the industry. (R. 224).

The Legislature is the exclusive judge of the remedies which may be applied and the limits of action so long as constitutional rights are not transgressed. Because House Bill No. 266 removes the opportunity as well as the temptation on the part of the operator of a

gas well to produce disproportionately to the production of a neighbor, it serves to protect the correlative rights of all owners in a common reservoir. We can certainly employ no better language in this connection than was used by the Supreme Court of Texas in *Brown v. Humble Oil & Refining Co.*, 83 S. W. (2d) at page 944:

> "We find no difficulty in ascertaining the clear meaning of the rule, (Rule 37, the well spacing rule) except that part which grants exceptions permitting the drilling of wells near another "to prevent waste or to protect vested rights." When this part of the rule is construed in connection with the cardinal rules of property above stated, we think the language used is *for the dominant purpose of protecting these property rights.* The language used is sufficiently definite and certain to protect the fundamental rights of all concerned when construed in connection with the general rule of property. It guarantees the opportunity in each owner to recover his oil by providing an exception to a uniform spacing regulation that would otherwise prevent him from doing so. The exercise of the police power under this rule does not change the rule of property. It merely regulates and controls the way in which his property shall be used and enjoyed." (Italics ours).

The fact that the allocation made by the orders is a temporary one does not render it arbitrary, nor detract from its effect as a true correlative rights measure. Of necessity such orders usually cover short terms because of rapidly changing potential productions and market demand from each of the pools. *Champlin Refining Company v. Corporation Commission*, supra.

Potentials and market demand vary because wells are brought in and old wells abandoned. The ever changing conditions require temporary allocations. This is particularly true of the production and consumption of natural gas because of the intimate relation of weather conditions to market demand.

5. **The Texas rule of ownership-in-place and the rule of capture offer no obstacles to the exercise of the power.**

Appellees contended in the trial court that because of the rule adopted by the courts of Texas that an owner of the surface owns the oil and gas in place under his land, some obstacle was presented to regulation by the State of gas production. That the Texas rule of ownership-in-place does not militate against the exercise of the State's police power with reference to the production of oil and gas has been repeatedly held, and there are no cases to the contrary. See *Brown v. Humble Oil & Refining Co.*, 83 S. W. (2d) 935, at 940, 99 A.L.R. 1107 (not yet officially reported); *Danciger Oil & Refining Company v. Railroad Commission*, 49 S. W. (2d) 837 at 840; *F. C. Henderson, Inc. v. Railroad Commission of Texas*, 56 Fed. (2d) 218, at 221; *Oxford Oil Co. v. Atlantic Producing Co.*, 22 Fed. (2d) 597; *Henderson Co. v. Thompson*, 14 Fed. Supp. 329, 334.

In the case of *Brown v. Humble Oil & Refining Company*, supra, the Supreme Court of Texas used this language:

> "The rule in Texas recognizes the ownership of oil and gas in place, and gives to the lessee a determinable fee therein. Lemar v. Garner, 121 Tex. 502, 50 S. W. (2d) 769; Humphreys

Mexia Co. v. Gammon, 113 Tex. 247, 254 S. W. 296, 29 A.L.R. 607; Waggoner Estate v. Sigler Oil Co., 118 Tex. 509, 19 S. W. (2d) 27; Texas Co. v. Daugherty, 107 Tex. 226, 176 S. W. 717, L.R.A. 1917F, 989.

"Owing to the peculiar characteristics of oil and gas, the foregoing rule of ownership of oil and gas in place should be considered in connection with the law of capture. This rule gives the right to produce all of the oil and gas that will flow out of the well on one's land; and this is a property right. And it is limited only by the physical possibility of the adjoining landowner diminishing the oil and gas under one's land by the exercise of the same right of capture. The following decisions discuss the law of capture as applied in this state: Stephens County v. Mid-Kansas Oil & Gas Co., 113 Tex. 160, 254 S. W. 290, 29 A.L.R. 566; H & T C Ry Co. v. East 98 Tex. 146, 81 S. W. 279, 66 L.R.A. 738, 107 Am. St. Rep. 620, 4 Ann. Cas. 827; Prairie Oil & Gas Co. v. State (Tex. Com. App.) 231 S. W. 1088. *Both rules are subject to regulation under the police power of a state.*" (83 S. W. (2d) 940, italics ours).

The Supreme Court of Texas, therefore, has definitely announced the principle that both the rule of ownership-in-place and the rule of capture are rules which are subject to regulation under the police power of the state.

Theories as to the character of property right which an owner of the surface has in oil and gas in place differ in many states. They are called the rule of ownership, rule of non-ownership and the rule of qualified ownership. No useful purpose can be served in this

litigation by a discussion of the difference. The courts of all jurisdictions are unanimous in holding that, regardless of the label which is placed on the property rights which the owners of the surface have in oil and gas in place, the rights or titles or estates are owned and enjoyed subject to a reasonable exercise of the police power of the State.

Appellees by their contention find themselves in the same dilemma which Mr. Justice White so well expressed in the case of *Ohio Oil Co. v. Indiana*, supra. This language appears in his opinion:

> "Indeed, the entire argument upon which the attack on the statute must depend involves a dilemma, which is this: If the right of the collective owners of the surface to take from the common fund, and thus reduce a portion of it to possession, does not create a property interest in the common fund, then the statute does not provide for the taking of private property without compensation. If, on the other hand, there be, as a consequence of the right of the surface owners to reduce to prossession, a right of property in them in and to the substances contained in the common reservoir of supply, then, as a necessary result of the right of property, its indivisible quality, and the peculiar position of the things to which it relates, there must arise the legislative power to protect the right of property from destruction. To illustrate by another form of statement the argument is this: There is property in the surface owners in the gas and oil held in the natural reservoir. Their right to take cannot be regulated without devesting them of their property without adequate compensation, in violation of the Fourteenth Amendment, and this although

> it be that if regulation cannot be exerted one property owner may deprive all the others of their rights, since his act in so doing will be *damnum absque injuria*. This is but to say that one common owner may devest all the others of their rights without wrongdoing, but the lawmaking power cannot protect all the owners in their enjoyment without violating the Constitution of the United States." (177 U. S. 210).

Though the non-ownership rule prevails in Indiana the above language was quoted by the Texas Supreme Court in the case of *Brown v. Humble Oil & Refining Company*, supra, as "equally applicable to the laws of this state." (83 S. W. (2d) 942).

If appellees are the owners of the gas which is in place under their lands, then the owners of the 200,000 acres in the sweet gas producing portions of the Panhandle field not owned by the pipe line companies are likewise the owners of the gas in place under their lands. Yet if the ratable production features of House Bill No. 266 are ineffective, it necessarily will follow that all of the sweet gas that is produced in the Panhandle gas field will eventually be produced through the wells of the companies with pipe line affiliations, including the gas owned by others. And when appellees say that the State of Texas is without power to set up a system which will in part prevent this result, to use the language of Mr. Justice White: "This is but to say that one common owner may devest all the others of their rights without wrongdoing, but the lawmaking power cannot protect all the owners in their enjoyment without violating the Constitution of the United States."

In its sixth conclusion of law the trial court held that:

> "Under the established laws of Texas, the correlative rights of persons owning lands or leases in a common source of supply of natural gas are the right to produce and the right to use all the gas that may be produced from their respective tracts so long as such production and use do not cause waste." (R. 185).

This conclusion is assigned as error by appellants. (R. 194).

The established laws of any state, as we understand the term, include laws passed by the Legislature. What is the established law today may become "unestablished" tomorrow by the enactment of a new and different law on the subject. Naturally the last expression of the legislative will is the controlling factor.

The trial court's sixth conclusion of law ignores the effect of House Bill No. 266. Before the Legislature spoke there is no doubt that each operator had the right to produce and use as much gas as he could from his tract, except insofar as his production was regulated under the general oil and gas conservation law. And before 1919, when the first law regulating oil and gas production was passed, his right was not even subject to this exception, because the Legislature had not established any law on the subject, and the common law governed. But certainly it must be obvious that because a person has been permitted to use his property without regulation in the absence of controlling legislation, the legislature is not forever barred from dealing with the subject.

All that the rule of capture means or has ever meant in the State of Texas or elsewhere is that, in view of the fact that oil and gas have no earmarks and are fugacious in character, a producer acquires title to any oil or gas that is *lawfully* produced through his wells, regardless of the fact that sometime prior to production it may have been under the land of his neighbor, or indeed may have been drained from the land of his neighbor. This so-called rule of capture is simply a court-made rule which originated in the early history of the oil business, due to the inability of the courts to establish a better rule in view of the meager knowledge of oil and gas matters at that time. The rule of capture has to do with title to oil and gas which is produced, not with the amount which may legally be produced from any well.[1]

If, by its conclusion of law above quoted, the trial court meant to elevate the rule of capture into some sort of vested right that was superior to and outside the orbit of the police power of the state, giving a perpetual right of drainage of neighboring lands, then the trial court held exactly contrary to the rulings of the Supreme Court of Texas on the same question. (See ante p. 113).

Indeed, the very court which decided the case now presented for decision has repeatedly held that the state may constitutionally restrict the production of oil, and it has never found that either the rule of ownership-in-

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[1]For a discussion of the origin and meaning of the rule of capture, see Hardwicke, "**The Rule of Capture and Its Implications as Applied to Oil and Gas,**" 13 Texas Law Review 391 (June, 1935).

place or the rule of capture presented any obstacle to the operation of the oil and gas conservation laws and the orders of the Railroad Commission promulgated thereunder, in so far as the production of oil is concerned. *Amazon Petroleum Corp. v. Railroad Commission*, 5 Fed. Supp. 633.

In the case of *Henderson Co. v. Thompson*, 14 Fed. Supp. 328, this language appears:

> "Regulations looking to the conservation of gas and the prevention of its waste may be validly made, and if they have a reasonable relationship to those things, it is immaterial that they interfere with the uses which the individual may desire to make of his property. A Texas landowner owns the gas in place under his land and he may withdraw the same by mining operations, and if in the course of so doing part of his neighbor's gas migrates to his land, he may withdraw that gas without liability. The statement of these facts, coupled with the known migratory character of gas, immediately makes it apparent that there must be some limitations upon these property rights which exist in the landowner."

So, when the trial court held that "under the established laws of Texas" all persons in a common source of supply of natural gas have the right to produce as much gas as they desire from their tracts so long as such production does not cause waste, the Court stated a proposition which obviously begs the question. The very question to be decided is the effect of House Bill No. 266 on the common law right of persons owning gas lands in a common reservoir to produce without regard to the effect of their production on the rights and interests of their neighbors.

We have no quarrel with the court's conclusion insofar as it refers to the law in Texas prior to the enactment of House Bill No.266. But since the rule of capture has definitely been held to be subject to the exercise of the police power, and if the police power of the state does embrace the right to enact legislation to protect and adjust the correlative rights of the owners of the surface in a common source of supply, then it is bound to follow that, under the "established laws of Texas," the correlative right of persons owning lands or leases in a common source of supply of natural gas is the right to produce a fair share of gas from a common source of supply, as such production is permitted under the pertinent orders of the Railroad Commission promulgated pursuant to the terms of House Bill No. 266. After all, the statute was designed to protect property rights, not to change them.

In its sixth conclusion of law, the trial court says: "House Bill No. 266 does not purport to create any new rule of property in Texas * * *." We are not particularly interested in the label that is given to the effect of House Bill No. 266 on the right of owners to withdraw gas from a common source ofsupply. The statute simply sets up machinery for the regulation of production. It does not attempt to partition oil and gas in place. It no more creates a new rule of property with reference to the production of gas than do the oil conservation laws, which provide for the restriction of production of oil to prevent waste, set up a "new rule of property" with reference to oil. In each instance, the regulation and restriction of production is by virtue of the exercise of the police power of the

state. Each owner of the surface still has the same property rights in the oil and gas in place under his land that he had before the laws were enacted. But his right to produce is regulated in the exercise of the police power. In the instance of oil, the regulation of production is to prevent commission of waste. In the regulation of the production of gas (assuming that the trial court correctly held that the order cannot be sustained as a waste-prevention measure, which will be discussed under another point) the restriction is placed on the unlimited right to produce by virtue of the exercise of the police power in protecting and adjusting the correlative and coexisting right of all the owners of the surface to withdraw from the common source of supply.

Since it is definitely established in Texas that the rule of capture is subject to the exercise of the police power of the state, the only question to be decided is whether House Bill No. 266 is a reasonable exercise of that power.

6. **The power having been validly exercised, its incidental effects are immaterial.**

A. **The statute relating solely to a mining operation, the production of gas, a local matter, interstate commerce is not involved.**

Appellees charge that the statute and orders constitute unlawful interference with transactions in interstate commerce, and place an unreasonable and unlawful burden on such commerce. They do not allege that there has been with respect to the statute or orders in question any discrimination practiced either by the Legislature or by the Railroad Commission against

them or other pipe line or producing companies producing gas for ultimate consumption outside of the State of Texas in favor of other pipe line companies producing gas and selling the same in Texas markets. The record shows that there are large light and fuel markets existing in the State of Texas which are supplied from the Panhandle and other gas fields of the State.[1]

In the case of *Oliver Iron Mining Company v. Lord*, 262 U. S. 172, 67 L. ed. 929, 43 S. Ct. 526, this court had for consideration a taxing act of the State of Minnesota levying an occupation tax equal to six per cent of the value of the ore mined or produced to be paid in addition to all other taxes. The situation with respect to the plaintiffs in that case was that "practically all of the output is mined to fill existing contracts with consumers outside of the State and passes at once into the channels of interstate commerce. * * * Steam shovels sever the ore from its natural bed and lift it directly into the cars. When loaded the cars are promptly returned to the railroad yards, where they are put into trains which start the ore on its interstate journey. The several steps follow in such succession that there is practically continuity of movement from the time the ore is severed from its natural bed."

After describing these operations and transactions this court held that mining being a local business its

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[1]In addition, there are 1215 gas wells located in other fields in Texas, having open flow productive capacities of 9,115,-645,000 cubic feeet daily, with a market demand of 230,223,-000 cubic feet daily, sweet gas, and 5,631,000 cubic feet daily, sour gas. (R. 496).

character is not affected by the intended use, nor controlled by contractual engagement and "persists even though the business be conducted in close connection with interstate commerce." That the tax may indirectly affect interstate commerce does not make it a forbidden burden or interference.

The case of *Utah Power and Light Company v. Pfost*, 286 U. S. 165, 76 L. ed. 1038, 52 S. Ct. 548, presents a situation where operation or manufacture and transmission was even more continuous than the operation considered in the *Oliver Iron Mining Company*. But as ponted out, the generator and the transmission lines of the Utah Power and Light Company performed different functions comparable to the manufacture of physical articles of trade and their subsequent shipment and transportation in commerce and the fact that manufacture and transmission of electrical energy was substantially instantaneous did not distinguish the case from the other decisions of the court holding that such production was a local transaction, citing *Hope Natural Gas Company v. Hall*, 274 U. S. 284; 71 L. ed. 1049, 47 S. Ct. 639.

In the latter case the chief business of that company was the production and purchase of natural gas in West Virginia and the continuous and uninterrupted transportation of it through pipe lines into adjoining states where it was sold, delivered and consumed, most of it passing into interstate commerce by continuous movement from the wells where it originated. This court, speaking through Mr. Justice McReynolds, held that the tax levied by the State of West Virginia when computed on the value of the gas at the well was not

subject to challenge as presenting a burden upon interstate commerce. The *Hope* case is particularly apposite to the issues here.

Numerous other cases occur where goods are produced or manufactured not only with the possibility of ultimate interstate commerce, but with the absolute certainty that they will move into interstate commerce. but until that movement has actually begun, not only the taxing power of the State may be applied, but the full force of its regulations under its police power may be exercised. *Arkadelphia Milling Co. v. St. Louis Southwestern Ry. Co.*, 249 U. S. 134, 63 L. ed. 517, 39 S. Ct. 237; *Federal Compress Warehouse Co. v. McLean*, 291 U.S. 17, 78 L. ed. 622, 54 S. Ct. 267; *Chassanoil v. Greenwood*, 291 U.S. 584, 78 L. ed. 1004, 54 S. Ct. 541. The direct burden upon interstate commerce imposed by the regulations involved in *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282, 66 L. ed. 239, 42 S. Ct. 106, and *Lemke v. Farmers Grain Company*, 258 U. S. 50, 66 L. ed. 458. 42 S. Ct. 244, and the distinction between such regulations and regulations operating only upon production, manufacture, or preparation of articles for interstate commerce is pointed out in the Chassanoil case.

The case of *Champlin Refining Company v. Corporation Commission*, supra, decisively concludes this issue against appellees' contentions.

B. Whether appellees will or will not purchase gas is immaterial.

The trial court held that if the Legislature of Texas intended to empower the Railroad Commission to

issue and enforce orders limiting and prorating the production of gas except for the purpose of preventing waste, the Act and the orders are invalid, for the reason that their necessary operation and effect is to confiscate appellees' private markets and devote them to others, and to confiscate the use of appellees' pipe lines and other facilities for transmitting their gas to market. (R. 184). Error is assigned to this conclusion. (R. 193).

What is the system provided for by House Bill No. 266? The Act provides (Sections 11 and 14) that whenever the daily potential production of all sweet gas wells located in a common reservoir is in excess of the daily reasonable market demand for such gas, the Railroad Commission shall ascertain and determine the reasonable market demand for gas for light and fuel purposes, and shall enter an order restricting the production of gas from all such wells to an amount equal to such market demand. In other words, the Railroad Commission is instructed to ascertain the daily market demand for sweet gas for lawful purposes and to enter an order fixing a total field allowable at that figure. The total field allowable is then allocated among the various wells in the field by the Railroad Commission on a reasonable basis and as set forth in Section 13 of the Act.

Restriction to reasonable market demand is no new thing in oil and gas regulatory statutes. The Oklahoma statute, which was sustained in the leading case of *Champlin Refining Co. v. Corporation Commission*, 286 U. S. 210, 76 L. ed. 1062, 52 S. Ct. 559, was a statute which provided for the restriction of oil

to the reasonable market demand for same. That statute was not rendered invalid because Champlin Refining Company was an integrated producer owning refineries, pipe lines, tank cars and gasoline stations, and the effect was to place some restraint on the use of its properties. It was not rendered invalid because Champlin Refining Company had a market for, or a way to transport and dispose of, all the oil that it could produce from its wells; nor was the statute rendered invalid by reason of any incidental effect of the regulation in forcing Champlin Refining Company to supplement the lawful production of its own wells by purchase from others in order to have enough oil to satisfy the demands of its customers. Since the state of Oklahoma, under its police power, had the right to restrict the production of oil from Champlin's wells. any incidental effect on Champlin's way of doing business, such as indirectly forcing Champlin to purchase oil, since it could not produce as much as it desired from its own wells, was wholly immaterial when pitched against the right of the state of Oklahoma to regulate the production from Champlin's wells in connection with the necessity of treating the pool as a whole.

Another case of the same character is the Texas case of *Danciger Oil & Refining Co. v. Railroad Commission*, 49 S. W. (2d) 837, where a restriction of production of oil to the market demand in the Panhandle oil field was upheld by the Court of Civil Appeals of Texas for the Third Supreme Judicial District.

It is wholly immaterial that, in the oil conservation cases just cited, the regulation of production was by vir-

tue of the right of the state to prevent waste. The restriction was by virtue of the exercise of the police power of the state. The restriction of production to protect the correlative rights of the owners of the surface in a commonly owned gas pool is likewise an exercise of the police power of the state. In either case, the Legislature, having chosen to impose the restriction, the incidental effects on those coming under its operation cannot affect the right of the Legislature to exercise its power.

What is the basis of appellees right to produce gas? Is it because they own contracts with affiliated pipe line systems, own booster stations, or have markets? Not in any sense. Their right to produce gas arises by virtue of their ownership of gas producing lands, and because of their ownership of wells thereon.[1] The law deals solely with the matter of production. It does not undertake to regulate appellees' pipe line systems, contracts, or their marketing systems; it does not give to any other producer in the Panhandle gas field the right to have his gas transported through appellees' pipe lines; it does not force appellees to buy a single cubic foot of gas from any other producer.

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[1]There is a marked similarity here to the coal mining companies which owned their own cars, involved in **Assigned Car Cases**, 274 U. S. 564, discussed ante p. 88. It was not their ownership of coal or of a market for same which brought the producers of coal within the jurisdiction of the Interstate Commerce Commission; it was the fact that cars were owned which they desired to put into commerce on railroad tracks. So here if appellees were not producers of gas, House Bill No. 266 would not apply to them.

Let us assume that there is only one pipe line system withdrawing gas from the Panhandle, and that such pipe line company does not own any gas producing lands or gas wells in the field. Would it then be contended by appellees that it was beyond the power of the Legislature to provide for a ratable production of the gas so as to prevent an excessive or disproportionate withdrawal on the part of any operator or group? The legislative power in such case seems to be apparent. How, then, does the fact that appellees and their affiliates also own pipe lines and marketing systems affect the right of a sovereign state to deal with them as producers of gas in a reservoir in which others besides themselves have rights?

It must be remembered that appellees are not the only ones whose former way of doing business is affected by this law. Those who have erected carbon black plants in the sweet gas area have been forced to close them in, or move to the sour gas portions of the field. *Portland Gasoline Co. and Henderson Co. v. Thompson*, 14 Fed. Supp. 328. Gasoline extraction plants have been forced to close down. *Clymore Production Co. v. Thompson*, 13 Fed. Supp. 469. Sweet gas producers who formerly sold their gas to carbon black plants and to gasoline extraction plants, by this statute have seen their gas dedicated to light and fuel uses, as to which the pipe line producers control the only outlet. It is clear that these provisions of the law are immensely valuable to appellees, as the effect is the preservation of their reserves. Such provisions represent legislation advocated by the pipe line producers before the 44th

Legislature of Texas. (R. 362, 423). Appellees are glad to accept the benefits of the law; they are willing for others to be restricted and regulated to their advantage; but, having sought and accepted the benefits, they now say that any incidental burdens that the operation of the law casts on them are beyond the power of the Legislature to enact.

The Texas law compels no purchaser to buy gas; it compels no pipe line company to connect to any gas well against its will. Any effect on purchasers and transporters is wholly indirect and arises only because of the fact that the amount of gas which producers may withdraw from their wells is regulated. A much more far reaching method of preventing disproportionate production was sustained by the Supreme Court of Oklahoma in *Oklahoma Natural Gas Co. v. State*, 161 Okl. 104, 17 Pac. (2d) 488. In that case an order of the Corporation Commission was upheld which mandatorily required a pipe line purchaser to connect to certain wells and purchase the gas therefrom in order to equalize the production from the wells in the field.

That the Legislature had the power to pass any reasonable legislation for the purpose of preventing disproportionate and excessive withdrawals from the common source of supply seems too well settled to admit of argument. Having that right, the Legislature is bound to be the exclusive judge of the means necessary to be adopted to effect that legitimate end. And where private rights come into conflict with the exercise of this prerogative of the police power, they must yield. For analogous cases, see *Pipe Line Cases* (U. S. *v. Ohio Oil Company*) 234 U. S. 548, 58 L. ed. 1459,

34 S. Ct. 956; *Nebbia v. New York*, 291 U. S. 502, 78 L. ed. 940, 54 S. Ct. 505; *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77.

In the instant case whether the operation of the statute will be such as to even affect the contracts of the appellees with their affiliated pipe line companies is purely a matter of implication. So far as the record is concerned it is not shown definitely, much less conclusively, that the appellees will not be able to comply with their contracts with the pipe line companies to which they are delivering gas, but the most that can be made from the record is that in order to carry out and comply with their contracts with such affiliated pipe line companies it may be that the appellees will choose to purchase some gas. At the most for the cases of the appellees, compliance with the statute may prove burdensome to them. Cf. *Gant v. Oklahoma City*, 289 U. S. 98, 77 L. ed. 1058, 53 S. Ct. 530; *Union Dry Goods Co. v. Georgia Public Service Corporation*, 248 U. S. 372, 63 L. ed. 309, 39 S. Ct. 117; *Sproles v. Binford*, 286 U. S. 374, 76 L. ed. 1167, 52 S. Ct. 581; *Champlin Refining Co. v. Corporation Commission*, supra; *Hadacheck v. Sebastian*, 239 U. S. 394, 60 L. ed. 348, 36 S. Ct. 143; *Walls v. Midland Carbon Co.*, supra.

It is apparent from the record that a correct solution of the problem, consistent with the interests of the public and at the same time offering a fair degree of protection to the rights of the owners of the surface, has been before the people of Texas and its Legislatures for at least five years. And surely the experience and knowledge gained through these many years of study-

ing the problem, the long and patient investigation that has been made, the conclusion reached by the Legislature as to the only possible solution of the difficulty consistent with a fair protection of both public and private interests, must overweigh the claim of appellees to conduct their business without legislative interference.

In *Booth v. Illinois*, 184 U. S. 425, 46 L. ed. 623, 22 S. Ct. 425, this court said that the Legislature might be mistaken, or that the statute might even be unwise, but that does not mean that it is invalid, even though the court may reach the conviction that the law will fail of its purpose. See also: *Bayside Fish Flour Company v. Gentry*, —U. S.—, 80 L. ed. ..... 56 S. Ct. 513; *Pacific Coast Box & Basket Co. v. White* 296 U. S. 176 80 L. ed. ....., 56 S. Ct. 159.

A strong presumption exists that a Legislature understands and probably expresses the needs of its own people, that its laws are directed to problems made manifest by experience, and that its discretion is based upon adequate grounds. *Middleton v. Texas Power & Light Company*, 249 U. S. 152, 63 L. ed. 527, 39 S. Ct. 227; *Otis & Gasman v. Parker*, supra; *Laurel Hill Cemetery v. City of San Francisco*, 216 U. S. 358, 54 L. ed. 515, 30 S. Ct. 301.

In *Miller v. Schoene*, 276 U. S. 272, 72 L. ed. 568, 48 S. Ct. 246, a Virginia statute was sustained which had the effect of requiring the owner of red cedar trees, infected by cedar rust, to cut down or destroy the trees where they constituted a menace to the apple-growing

industry. The court said that it was for the Legislature of the state to decide whether or not a condition was presented which required a legislative choice of remedies between the preservation of the apple industry or the growing of ornamental cedar trees.

> "When forced to such a choice the state does not exceed its constitutional powers by deciding upon the destruction of one class of property in order to save another which, in the judgment of the legislature, is of greater value to the public." (276 U. S. 279).

But it is claimed by the appellees that the other owners of the Panhandle gas reservoir are not the public, and that the Legislature is not entitled to pass any law which interferes with appellees' right to withdraw as much gas as they desire from their own wells, regardless of the harmful effect on their neighbors, or of the interests of the public in the orderly production of gas. The language of the *Miller* case is again apposite:

> "It will not do to say that the case is merely one of a conflict of two private interests and that the misfortune of apple growers may not be shifted to cedar owners by ordering the destruction of their property; for it is obvious that there may be, and that here there is, a preponderant public concern in the preservation of the one interest over the other. * * * And where the public interest is involved preferment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power * * * ." (276 U. S. 279).

In *Noble State Bank v. Haskell*, 219 U. S. 104, 55 L. ed. 112, 31 S. Ct. 186, the objection was made to the Oklahoma guaranty fund law that it, in effect, took the property of solvent banks without return to pay the debts of a failing rival in business. Mr. Justice Holmes answered the argument as follows:

> "Nevertheless, notwithstanding the logical form of the objection, there are more powerful considerations on the other side. In the first place, it is established by a series of cases that an ulterior public advantage may justify a comparatively insignificant taking of private property for what, in its immediate purpose, is a private use. Clark v. Nash, 198 U. S. 361, 49 L. ed. 1085, 25 Sup. Ct. Rep. 676, 4 A. & E. Ann. Cas. 1171; Strickley v. Highland Boy Gold Min. Co. 200 U. S. 527, 531, 50 L. ed. 581, 583, 26 Sup Ct. Rep. 301, 4 A. & E. Ann. Cas. 1174; Offield v. New York, N. H. & H. R. Co. 203 U. S. 372, 51 L. ed. 231, 27 Sup. Ct. Rep. 72; Bacon v. Walker, 204 U. S. 311, 315, 51 L. ed. 499, 501, 27 Sup. Ct. Rep. 289. And in the next, it would seem that there may be other cases beside the everyday one of taxation, in which the share of each party in the benefit of a scheme of mutual protection is sufficient compensation for the correlative burden that it is compelled to assume. See Ohio Oil Co. v. Indiana, 177 U. S. 190, 44 L. ed. 729, 20 Sup. Ct. Rep. 576, 20 Mor. Min. Rep. 576." (219 U. S. 110).

In *Stephenson v. Binford*, 287 U. S. 251, 77 L. ed. 288, 53 S. Ct. 181, this court upheld the orders of the Texas Railroad Commission, passed pursuant to the statute providing for the regulation of private contract motor carriers, which prohibited rates being

charged that were less than those charged by railroad carriers, even though the provision had the definite tendency to divert traffic from the motor carriers to the railroads. The court held that the state had the right to protect and safeguard its highways and the use thereof, and that any regulation which had a reasonable relation to this valid object was constitutional, even though it indirectly took business from the motor carriers and gave same to their competitors.

Competitive conditions are not beyond the purview of the police power. Where economic maladjustments exist which are of concern to the public, Congress in its sphere, and the state Legislature acting under the police power, can adopt reasonable measures for their correction. See *Pipe Line Cases*, 234 U. S. 548, 58 L. ed. 1459, 34 S. Ct. 956; *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *Nebbia v. New York*, 291 U. S. 502, 78 L. ed. 940, 54 S. Ct. 505; *Borden's Farm Products Co. v. Ten Eyck*, 296 U. S. ....., 56 S. Ct. 453, 80 L. ed.....

Appellees say that the gas law penalizes them because they have invested huge sums of money and have exercised foresight and diligence in procuring an outlet for sweet gas. As we have seen, inasmuch as the restriction is placed on them simply as producers, and in no other capacity, any effect on their business of transporting and distributing gas is wholly incidental and arises wholly by virtue of the fact that they cannot produce as much as they would like to produce. After all, the problem and the solution were for the Legislature; and unless it can be said that House Bill No.

266 is a wholly arbitrary and capricious working out of the problem, the Act must be sustained.

Legislation which is valid under one state of facts might be entirely invalid when applied to different conditions and different facts. See *Clark v. Nash*, 198 U. S. 361, 49 L. ed. 1085, 25 S. Ct. 676, and *Offield v. New York, etc. R. Co.* 203 U. S. 372, 51 L. ed. 231, 27 S. Ct. 72. But if the problem is sufficiently serious, if the public at large is interested in its proper solution, if private interests are so conflicting that there must be a legislative correction to prevent harmful discord, then any reasonable solution worked out by the Legislature falls well within the limits of constitutionality, and private rights must yield.

7. The public interest in a long-continued supply of natural gas for light and fuel purposes sustains the statute.

The Panhandle gas field is the largest natural gas field in the United States. Approximately 10,000,000 persons in the United States are dependent on it for their supply of gas for light and fuel purposes, and many important cities in the United States are dependent on said field for the gas which they use for domestic and industrial purposes, including such towns as Chicago, Des Moines, Omaha, Kansas City, St. Paul, Minneapolis, Indianapolis, Denver, Fort Worth and Dallas. (R. 187). In the comparatively short time that the field has been in operation, up to August, 1935 approximately 686 billion cubic feet of gas have been produced from the Panhandle field to supply the needs of the nation for natural gas for heat and fuel purposes. (R. 441, 500).

What would be the effect on this giant gas reserve if the conditions which existed prior to the enactment of House Bill No. 266 had been allowed to continue? At that time approximately 450 million cubic feet of gas per day, much of it sweet gas, were being used for the manufacture of carbon black; more than one billion cubic feet of gas per day, much of it sweet gas, was being allowed to escape into the air after its natural gasoline content had been extracted. (R. 551). That this condition, if allowed to continue, would prematurely exhaust the reservoir and render its worthless to those who were interested in the use of same for a source of supply of natural gas for light and fuel purposes, must be apparent. Indeed, we are sure that appellees will not deny that this is true, in view of the fact that one of them, Texoma Natural Gas Company, devoted its time and money to sponsoring a conservation association for the purpose of bringing to the attention of the public and the Texas Legislature the harmful result which would follow unless corrective measures were taken. (R. 362-372, 378).

In view of the fact that appellees and those similarly situated enjoy a monoply of the only outlet available, or possible to be secured, for sweet gas for light and fuel purposes, (R. 187) the Legislature was necessarily confronted with this dilemma: First, it could allow the existing condition to continue, which, in effect, sanctioned the law of the jungle where each secured what he could as quickly as he could, regardless of the effect on his neighbors or on the public. Second, it could pass a law which restricted the use of sweet gas to light and fuel purposes. This would

have the effect of dedicating to the pipe line producers all of the sweet gas in the Panhandle reservoir, although at least 1/5th of said reservoir was owned by others. Such a law would necessarily have the effect of making it impossible for those in the latter class to produce any gas at all from their wells and properties, since the outlet was controlled entirely by the pipe line producers; this, in itself, would raise serious constitutional questions.[1] *Ohio Oil Co. v. Indiana*, supra; *Pennsylvania Coal Co. vs. Mahon*, 260 U. S. 393, 67 L. ed. 322, 43 S. Ct. 158; *F. C. Henderson, Inc., vs. Railroad Commission*, 56 Fed. (2d) 218. Third, it could pass a law which adequately protected the interest of the public by restricting the use of sweet gas to light and fuel purposes, thus prohibiting the harmful waste which was taking place, and at the same time it could provide for a system of ratable production which would allow each surface owner in the common reservoir to produce a fair share of the total gas produced.

If the Legislature had adopted the first alternative, that of non-action, unquestionably the interests of the public would have been sacrificed. The pipe line companies would have been injured also; indeed their entire investments would have been placed in jeopardy.

The pipe line producers, including appellees, would have welcomed legislative action by way of adopting the second alternative, in that it would have permitted them to take unrestrained from all the sweet gas pro-

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[1] "Confiscation may result from a taking of the use of property without compensation quite as well as from the taking of title." **Chicago etc. Ry. v. United States**, 284 U. S. 80, 76 L. ed. 177, 52 S. Ct. 87.

ducing portions of the Panhandle gas field. Indeed, Texoma Natural Gos Company drafted and procured the introduction before the 44th Legislature of Texas of a bill which would have had this very effect. (R. 381, 423).

Can it be said the Legislature acted unreasonably in refusing to accept the unwholesome results involved in the first two possible choices?

The fact is that while giving lip service to the principle that each operator should be permitted to produce a fair share of the gas produced from the Panhandle gas field, the appellee Texoma has consistently opposed any system which would make this possible, and has at all times endeavored to continue in effect regulations by which it and those similarly situated could enjoy the use of sweet gas lands to the exclusion of all other operators. This company attacked the earlier laws and orders which undertook to solve the problem. Then, when the law was in force which permitted each producer in the Panhandle gas field to use his gas for any beneficial purpose, Texoma procured suits to be brought undertaking to have that law declared unconstitutional, so that those who were enjoying the benefit of that outlet for gas would be entirely deprived of the right to use beneficially their gas production. The history of this particular litigation is reflected in *Sneed v. Phillips Petroleum Company*, 76 Fed. (2d) 785. The record shows that Texoma Natural Gas Company assisted in the financing and prosecution of the Sneed suit although it did not choose to be a nominal party plaintiff. (R. 378).

In other words, Texoma Natural Gas Company is

not willing for any producer in the Panhandle field to use his sweet gas for any purpose except light and fuel. They and those similarly situated have a monoply on the only outlet in existence for sweet gas for light and fuel purposes; and at the same time assert that it is beyond the power of the Legislature to set up a system whereby those who own interests in the sweet gas producing portion of the field other than themselves may make beneficial use of their gas.

It may be seriously doubted, in view of the history of the regulatory acts passed by the Texas Legislature with reference to the production of gas, that the Legislature will ever be willing to allow to remain in force regulations which deprive all but the pipe line producers of the right to enjoy a benefit from their property. These statutes have already been reviewed in this brief, and it seems sufficient to say at this time that they show that it has been the consistent policy of the Texas Legislature to protect the interest of the public in the enjoyment of this reservoir for light and fuel purposes, so long as such protection was consistent with an opportunity on the part of all who owned a part therein to produce and market a fair share of gas.

The Legislature had the right to enact a statute restricting the production of gas from appellees' wells to prevent appellees' neighbors from being forced into wasteful surface operations to secure some outlet for their gas. The case of *Champlin Refining Co. vs. Corporation Commission*, supra, is in point. This lan-

guage shows some of the facts justifying the legislation and orders there sustained:

> "And because of the lack, especially on the part of the non-integrated operators, of means of transportation or appropriate storage and of market demand, the contest (to recover oil) would, as is made plain by the evidence and findings, result in surface waste of large quantities of oil." (286 U. S. 233).

The contest of which the court speaks was one brought about by the fact that integrated producers owning steel storage, pipe lines and the like were producing oil from a common reservoir at a time when their neighbors had no market and no steel storage. To protect themselves the non-integrated producers were forced to produce their oil into earthen storage, which is very wasteful.

> " * * * if no curtailment were applied, crude oil for lack of market demand and adequate storage tanks would inevitably go into earthen storage and be wasted; that the full potential production exceed all transportation and marketing facilities and market demand; that accordingly it was necessary in order to prevent waste, that production of flush and semi-flush pools should be restricted as directed by the proration orders, and that to enforce such curtailment, with equity and justice to the several producers in each pool, it was necessary to enforce proportional taking from each well and lease therein * * * ." (286 U. S. 230).

If the fact that the operations of an integrated oil producer, with pipe line and steel storage, will compel

a non-integrated producer, owning no steel storage, to produce his oil to protect his interests and to store same in earthen storage, with the enormous surface loss incident thereto; and if the police power may be exercised to prevent such waste by the restriction of production of all producers to the market demand for oil, so that each can produce his oil "with equity and justice," can it be fairly said that the Legislature of Texas is powerless to prevent the surface waste of gas resulting through less beneficial uses by providing for a similar restriction in the production of gas?

It is no answer to say that the Legislature was not forced to make the choice which it made, or to say that the evil condition could be corrected by simply prohibiting the less beneficial uses which would cause the surface waste. So, in the *Champlin* case, earthen storage could have been prohibited, which would have prevented occurrence of the surface losses which the Supreme Court found to exist. But the Oklahoma Legislature chose to reach the desired end by restricting the production from the oil pool to the market requirements, and the court expressly found that this was a means which accommodated "equity and justice to the several producers in each pool." The choice of the means must rest with the Legislature. If it has reasonable relation to the accomplishment of a valid object, it is not for the courts to say that a different policy should have been pursued.

The statute considered by this court in *Nebbia vs. New York*, 291, U. S. 502, 78 L. ed. 940, 54 S. Ct. 505, was much more far-reaching than House Bill No. 266. There the New York Legislature concerned it-

self with evils existent in the milk industry of New York, which had seriously impaired the prosperity of the milk producers and distributors, and threatened to militate against the interests of the public in a certain and healthful supply of this necessary commodity. The uncertainty and seasonal variation of the consumer demand for milk made it necessary for a surplus supply to be always available, and unless the expense of maintaining such a surplus could be distributed among various persons engaged in the distribution of milk, destructive competition would result, to the detriment of the producers of milk, and ultimately to the detriment of the public. Price cutting and ruinous competition had likewise combined to add to the general harmful condition. To meet the situation, the Legislature of New York passed a law which made it unlawful for a milk dealer to sell or buy milk for less or more than a price fixed by an administrative board.

There is a striking similarity in the facts which were before the Legislature of New York and those which were before the Legislature of Texas at the time of the enactment of House Bill No. 266. The operation of the economic law of supply and demand had been conclusively shown to be wholly insufficient in the production of gas from the Panhandle field, a common reservoir, where certain operators control the only lawful outlet for such gas, while others are in effect denied the right to produce or use their gas. That the resulting conflict has resulted in waste harmful to the public, just as it did in New York, cannot be questioned. The following language from

the opinion of Mr. Justice Roberts in the *Nebbia* case should conclusively determine the validity of House Bill No. 266, the terms of which fall far short of the far-reaching regulations of the New York Law:

> "If the lawmaking body within its sphere of government concludes that the conditions or practices in an industry make unrestricted competition an inadequate safeguard of the consumers' interests, produce waste harmful to the public, threaten ultimately to cut off the supply of a commodity needed by the public, or portend the destruction of the industry itself, appropriate statutes passed in an honest effort to correct the threatened consequences may not be set aside * * * ." (291 U. S. 538).

8. Texoma having affirmatively invoked legislative action cannot now repudiate the incidental obligations imposed by the statute.

There can be no question that the provisions of House Bill No. 266, which restrict sweet gas to light and fuel uses, result in tremendous benefits to appellees. The trial court has found, (R. 187), that the pipe line producers constitute the only outlet available for sweet gas for the purposes permitted by the statute. The effect of the law is to dedicate the sweet gas producing portions of the field to these appellees and to those similarly situated.

Appellee Texoma Natural Gas Company, in addition to being a prime spirit in the activities of the Panhandle Conservation Association, seeking a repeal of the law which authorized the use of gas for any beneficial purpose (R. 362, 373), likewise had its counsel draw and cause to be introduced before the

Legislature a bill which definitely restricted sweet gas to light and fuel uses (R. 423, 381); and its representative appeared before the Legislature and urged the adoption of the law. (R. 373). The Legislature incorporated in the Act, which was finally passed, the provisions sought by appellee Texoma, the protection of which it now enjoys. (R. 365). The question may well be raised whether this company is entitled to seek and enjoy the benefits of the law, and at the same time repudiate the incidental obligations imposed thereby; whether having invoked affirmatively this legislative action it may deny the legislative discretion and the force of the regulation in those respects which it deems disadvantageous to it while reaping its benefits. This position it may not assume. See *United Fuel Gas Co. v. Railroad Commission of Kentucky*, 278 U. S. 300, 73 L. ed. 390, 49 S. Ct. 150; *Booth Fisheries Co. v. Industrial Com. of Wisconsin*, 271 U. S. 208, 70 L. ed. 908, 46 S. Ct. 491. In *United Fuel Gas Co. v. Railroad Commission of Kentucky*, supra, it was said:

> "It is the rule of this court, consistently applied, that one who has invoked action by state courts or authorities under state statutes may not later, when dissatisfied with the result, assail their action on the theory that the statutes under which the action was taken offend against the Constitution of the United States. Wall v. Parrot Silver & C. Co., 244 U. S. 407 L. ed. 1229, 37 S. Ct. 609; Electric Co. v. Dow, 166 U. S. 489, 41 L. ed. 1088, 17 S. Ct. 645; Eustis v. Bolles 150, U. S. 361, 37 L. ed. 1111, 14 S. Ct. 131; Hurley v. Comm. of Fisheries, 257 U. S. 223, 66 L. ed. 206, 42 S. Ct. 83; St. Louis Malleable Castings

Co. v. George C. Prendergast Constr. Co., 260 U. S. 469, 67 L. ed. 351, 43 Sup. Ct. Rep. 178. Upon like principle, we think that appellants, who have produced action by a state commission under a state statute, may not assail that action in a federal court of equity on the ground that that statute, or the one creating the commission, is void under the State Constitution. Cf. Sheppard v. Barron, 194 U. S. 533, 48 L. ed. 1115, 24 S. Ct. 737. The sound discretion which controls the exercise of the extraordinary powers of a federal court of equity should not permit them to be exerted to relieve suitors on such a ground from the very action of state authorities which they have invoked." (278 U. S. 307).

III.

The act does not delegate to the Railroad Commission legislative and judicial powers in violation of the Constitution of Texas.

1. **House Bill No. 266 cannot be construed as vesting in the Railroad Commission the power to ascertain and partition gas rights in Texas.**

The trial court held in its opinion (R. 159) and in its conclusions of law (R. 186) that, *if* House Bill No. 266 be construed as intended to appoint the Commission as a body to ascertain and partition the rights of oil and gas owners, it would be a palpable and direct violation of Section 1, Article II, of the Constitution of Texas, in that it would be an attempt to dele-

gate to the Commission both legislative and judicial powers, leaving to it at will, by regulations of its own devising, to take from one and give to other's property, rights in property, and use thereof.

The trial court did not hold that House Bill No. 266 violates this particular provision of the Texas Constitution, either as it construed the Act, or if it be given the construction which, as already developed under our first point, we insist it requires. In view of this holding any discussion of the point would be unnecessary were it not for the appellees' contentions that though falling short of attempting to partition gas in place, the Act nevertheless violates the principle of the trinity of governmental functions. These contentions will doubtless be urged as in all events supporting the trial court's judgment.

We do not, and neither did the trial court, construe House Bill No. 266 to vest the Railroad Commission with power to ascertain and partition the rights of owners of the gas reservoirs of Texas. We urged no such construction of the Act in the trial court. It would seem that in making it the mandatory duty of the Railroad Commission to ascertain the reasonable market demand for gas in a common reservoir and to enter an order restricting the total production of all wells in such reservoir to the amount of the market demand so found, allocating the allowable production among the various wells located therein, the Legislature fell far short of undertaking to ascertain and partition gas in place, or of authorizing the Railroad Commission to do so. Apparently, what the trial court considered was that one method which possibly

could have been adopted to protect the correlative rights of the owners of the surface in a common reservoir was a system whereby the exact amount of gas owned in place by each owner would be ascertained; and each such owner would thereafter be permitted to produce from the common reservoir only the amount of gas which he was found to own at the date of such ascertainment. Such a system possibly would be an undertaking to ascertain and partition rights to natural gas in place. That this was the sort of "partition" that the court had in mind is made apparent from language appearing in its opinion where it criticizes the Act "because it makes no provision for a definite and final ascertainment, partition, and setting aside to each owner of the amounts he is entitled to draw from the reservoir." (R. 159).

We join with the trial court in asserting that House Bill No. 266 does no such thing; it does not provide for definitely ascertaining the exact amount of gas under each producer's lease, and prohibit him from producing more than such total amount thereafter. Whether, if it had undertaken to do so, the Legislature could have delegated the power to the Railroad Commission to carry such an act into effect, is an inquiry wholly academic.

What the trial court apparently overlooked is the middle ground resting somewhere between no regulation at all and one which undertook to fix in a definite and final way ownership of gas in place, setting aside to each owner the total amount he is entitled to draw from the reservoir. To use the language of *Meeker v. East Orange*, 74 Atl. 379, 25 L.R.A. (N.

S.) 464, in its criticism of the author of the opinion in *Acton v. Blundell,* 12 Mees & W. 324 (discussed ante, page 62):

> "Obviously he failed to note that there is a middle ground between the existence of an absolute and indefeasible right and the absence of any right that the law will protect. There is room for the existence of qualified and correlative rights in both landowners."

2. The provisions of the Texas Constitution relative to the division of governmental powers offer no obstacle to the exercise by the Commission of the powers vested in it by House Bill No. 266.

For many years statutes have been in force in Texas which delegate to the Railroad Commission the duty of entering oil proration orders for the purpose of preventing waste, and directing the Railroad Commission, where a top allowable is fixed for a given oil pool, to allocate the allowable production among the various wells in the pool "on a reasonable basis." (See ante, pages 38 and 31). Acting under the authority of these statutes, the Railroad Commission has entered many orders fixing top field allowables for various oil fields, and allocating to each oil well its share of the allowable production. Attacks have been made on the authority of the Railroad Commission to act under these statutes, the claim being made that the statutes constitute an unconstitutional delegation of legislative and judicial authority. In each instance these contentions have been overruled, and the authority of the Railroad Commission to carry out the duties delegated to it has been upheld. For example, in *Danciger Oil & Refining Company of Texas v. Smith.*

4 Fed. Supp. 236, Circuit Judge Hutcheson said, in discussing the validity of an oil proration order covering the Panhandle oil field:

> "* * * It is sufficient to say that we are fully committed, by the decisions already rendered, to the proposition that the Legislature has the power to prevent such waste, *and that it has lawfully and effectively delegated that power to the commission* . * * *. We have no difficulty in finding, we have never had, under the statutes of this state, that the commission has the power to regulate production in all of the oil and gas fields of Texas, to prevent the occurrence of waste therein." (Italics ours).

Again, in *Amazon Petroleum Corporation v. Railroad Commission*, 5 Fed. Supp. 633, Circuit Judge Hutcheson, in sustaining the validity of a proration order of the Railroad Commission affecting the East Texas oil field, where a top allowable was fixed and the allowable was allocated by the Commission's order among the various wells affected, said, with respect to cases theretofore decided by three-judge Federal Courts in Texas:

> "We were at pains in them all, we are at pains again, to make it clear that in our opinion the state, through the Legislature, has broad powers in conserving its natural resources of oil and gas, to regulate and control the business of producing and handling them, *with the right to broadly delegate to the Commission, as statutory agents, the administration of the regulation and control it decides upon.*" (Italics ours).

Again, in *People's Petroleum Producers v. Smith*, 1

Fed. Supp. 361, this language appears (per Judge Hutcheson):

> "We have repeatedly, and without varying, held that the state may, in the interest of the conservation of its natural resources, provide by legislation within constitutional limits for the regulation of the drilling for, the production and the marketing of, oil to prevent waste. *That it may constitute the commission statutory agent of the State, and may delegate to it authority to make within the limits of the grant of power just and equitable rules and regulations to effect these ends.* * * * In People's Petroleum Producers, Inc., v. Sterling (D. C.) 60 F. (2d) 1041, we carefully examined the statutory provisions against waste contained in the present statutes (Vernon's Ann. Civ. St. Tex. art. 6014, 6049c), which are set out in a note to that opinion, and found nothing in them which contemplated, required, or permitted either unreasonable or unjust restrictions upon production. We found, upon the contrary, that, while allowing the commission to make orders prorating production from a pool if necessary to prevent waste, *they in terms required the apportionment to be made among the wells as the facts justly and equitably required. We accordingly found the statutes valid against attack.* No case has been called to our attention, and we have found none, which requires modification of these views. We again find the statutes valid." (Italics ours).

If these oil and gas conservation statutes empowering the Railroad Commission to enter orders restricting the total production from a given field to prevent waste, do not run counter to the provisions of the Texas Constitution providing for the separation of

governmental powers, wherein does House Bill No. 266 do so? From the standpoint of this particular provision of the Texas Constitution, what is the distinction between empowering the Railroad Commission to restrict the total production of a gas field and to allocate same among the various wells located in the field, and empowering the Railroad Commission to restrict the production of an oil field and to allocate that allowable production among the various wells located therein?

Assuming that the Legislature of Texas may constitutionally provide for the regulation of the production of gas from a commonly owned reservoir for the purpose of protecting and adjusting the correlative rights of the surface owners, then it necessarily follows that, like regulations of the production of oil for the prevention of waste, the regulation is imposed by virtue of the exercise of the police power. If the Legislature may direct the Railroad Commission to impose the restriction in one case, why may it not do so in the other? If the Legislature of Texas, acting under its police power to prevent waste, may delegate to the Railroad Commission the duty of regulating the production of oil, why, acting under its police power to protect and adjust the correlative rights of the owners of a common gas pool, may it not likewise delegate to the Railroad Commission the duty of regulating the production of gas? Certainly no distinction appears because, in the one case, the regulation of production is to prevent waste, and in the other (we are assuming) it is not. Both being a valid exercise of the police power, the Legislature, under well settled principles,

has the right to delegate to an administrative body the duty of "filling in the details."

For example, in *Brown v. Humble Oil & Refining Co.*, supra, the Supreme Court of Texas had under consideration the validity of the oil and gas conservation statutes which empower the Railroad Commission to regulate the spacing of wells, and Rule 37 promulgated by the Commission in pursuance thereof. This language appears in the opinion:

> "The Legislature in the exercise of its power has passed regulatory measures to prohibit the waste of oil and gas in this state. Title 102, Vernon's Annotated Texas Statutes, and Supplements thereto. The power of the Railroad Commission to act on this matter is limited to the authority granted by the Legislature. The fundamental standards prescribed in the statutes will control. Certain acts were passed which specifically declare the public policy of this state which respect to the development and protection of oil and gas, and establish primary standards relating to such policy, *and placed the duty upon the Railroad Commission to carry out the details under the general provisions of the statutes. That this is a* valid *exercise of power is now definitely settled.* * * *
>
> "Does the Railroad Commission possess the power to carry out the purposes for which rule 37 was adopted? Section 59 (a), article 16, of the Constitution directs the Legislature to do whatever is necessary for the conservation of natural resources. The Legislature has undertaken to comply with this provision of the Constitution. Therefore, the Railroad Commission, acting under valid laws, has ample authority, under

both the Constitution and the police power, to prevent waste and conserve the mineral interests of this state. This rule is supported by a host of authorities." (83 S. W. (2d) 940, 941, italics ours).

In *Railroad Commission v. Bass.*, 10 S. W. (2d) 386, the court directs attention to the fact that Rule 37 reserves in the Commission the right "in order to prevent waste and to protect vested rights" to make exceptions to fit particular situations and grant permission to drill wells in closer proximity than the rule prescribes generally. The right of the Commission to promulgate this exception to the rule designed to protect vested rights was upheld as a necessarily implied power, though no express statutory authority to promulgate such exception has ever been given to the Commission. See, *State v. Jarmon*, 25 S. W. (2d) 936; *Marrs v. City of Oxford*, 24 Fed. (2d) 541, 32 Fed. (2d) 134; *Oxford Oil Co. v. Atlantic Producing Company*, 16 Fed. (2d) 639, 22 Fed. (2d) 597. (application for writ of certiorari denied); *Tysco Oil Company v. Railroad Commission of Texas*, 12 Fed. Supp. 195.

As authority for its conclusion the trial court cites the case of *Board of Water Engineers v. McKnight*, 111 Tex. 82, 229 S. W. 301.[1] The statute there considered undertook to empower the Board of Water Engineers to adjudicate vested water rights with reference to the use of waters of any stream or other source of supply in this state, and to give to the

[1]In the trial court's opinion the case is styled **Board of Water Control v. McKnight.**

Board's adjudications, when not appealed from, the same verity as is given to the judgments of courts of competent jurisdiction. In holding the statute unconstitutional as delegating judicial powers, the Supreme Court of Texas said:

> "In order to make the determinations required of the Board of Water Engineers in Texas, they must decide the most intricate questions of law and of fact questions with respect to the validity and superiority of land titles, questions of contract, questions of boundary, questions of limitations, and questions of prescription. An inquiry involving such questions and resulting in the binding adjudication of property rights is strictly judicial * * *." (229 S. W. 307).

We have no quarrel with the decision in the *McKnight* case; but there is an obvious distinction between empowering an administrative board to make final and binding adjudications, *having the force of judgments*, with reference to the appropriation of water, and a statute of the type presented by House Bill No. 266. In citing the McKnight case, the trial court apparently ignored later cases (one of them involving the very same statute) by the Supreme Court of Texas dealing also with the subject of water rights, which later cases are much more analogous to the situation presented in this appeal, to-wit, *Motl v. Boyd*, 116 Tex. 82, 286 S. W. 458; *Trimmier v. Carlton*, 116 Tex. 572, 296 S. W. 1070.

In the case of *Motl v. Boyd*, supra, a different part of the same law which was under consideration in the *McKnight* case was before the Supreme Court. The act authorized the Board of Water Engineers to issue

permits to citizens of Texas to use given quantities of the unappropriated waters of this state, made it the duty of the board to reject all applications and refuse to issue the permits asked for if there were no unappropriated water in the source of supply, or if the proposed use conflicted with existing water rights, or was detrimental to the public welfare (Section 24). The Supreme Court had no difficulty in finding these provisions to be within the range of legitimate legislative processes:

> "The statutes involved in the present case are mere administrative statutes, by which a license is granted or refused, and nothing adjudicated. Section 44 of Chapter 88 declares that a water right obtained under the statute is simply the right to use the water of the state for the purposes specified in the act and in the quantity stated in the permit. * * *.
>
> "Manifestly the determination of the subjects required in Section 24 is the mere performance of an administrative duty. It is the duty of the board to reject applications where there is no unappropriated water in the source of supply. The facts as to that question can be determined by the board by the mere matter of adding up the amount of water previously appropriated and shown on their records, and subtracting it from the amount of state water which they had previously determined the stream furnished. That is clearly administrative." (286 S. W. 474-5).

Again, in *Trimmier v. Carlton*, supra, the Supreme Court of Texas had under consideration the validity of a Texas statute which authorized the Board of Water Engineers to consider applications for the

formation of water conservation or irrigation districts; and where the Board found that the proposed district is practicable and will serve a beneficial purpose, to order an election held as to the formation of the district.

In sustaining the validity of the statute, the court said:

> "We think, from a plain interpretation of our own constitutional provisions, in the light of the history of the subject of municipal legislation in this country, in England, and in this state, that the statutes here attacked do not involve the delegation of either legislative or judicial power in violation of the Constitution, but that in this respect they are entirely consistent therewith. This conclusion is consistent with the general line of authorities thoroughout the country. Fallbrook Irrigation District v. Bradley, 164 U. S. 112, 17 S. Ct. 56, 41 L. ed. 369; Embree v. Kansas City Road District, 240 U. S. 242, 36 S. Ct. 317, 60 L. ed. 624 * * *." (296 S. W. 1081).

After all, the provisions of the Texas Constitution are no different in this regard than are the constitutions of practically all the states in the Union. *Trimmier v. Carlton* expressly so held:

> "There is nothing in this article nor in succeeding ones which materially differentiates our Constitution in the respect here involved from those of the other states of the Union. They all provide for the division of the powers of government into three departments, in language similar to our own. 6 Ruling Case Law, p. 144, Sec. 144; Cooley's Constitutional Limitations (8th Ed.) Vol. 1, p. 175. It may therefore be said that the general prin-

ciples of constitutional law, as declared by the various states of the Union, and by the Supreme Court of the United States, on the subject of delegation of legislative power, are applicable and may be examined in determining the meaning of our own constitutional provisions." (296 S. W. 1079).

In this case it is said:

"* * * there are many powers which the Legislature might exercise, and sometimes does exercise, which may be delegated. For example, it is not a delegation of legislative power, in violation of the Constitution, to grant some designated body powers which the Legislature cannot itself practically and efficiently exercise, * * *." (296 S. W. 1079).

The case of *Kinney v. Simpleman*, 36 Tex. 554, is quoted:

"The Legislature enacts laws to be administered by the judicial, executive, and ministerial officers; and in so far they delegate their power to these officers—a power directly derived through them from the people, and more conveniently exercised than it could be by the Legislature itself, immediately. Indeed, it would be impracticable in many instances, without these mediate agencies, for the Legislature to carry out the objects and purposes of the law. In some cases it would be impossible. * * * These principles are familiar to the theory and practical working of every constitutional form of government."

In *Burgess v. American Rio Grande Land & Irrigation Co.*, 295 S. W. 649 (writ of error refused), the Court of Civil Appeals for the Fourth District of

Texas, sustained the constitutionality of the statute creating the Board of Water Engineers against the attack that it delegated to the Board legislative and judicial power. In its opinion the court said:

> "* * * The customs of the ages have given the Legislature the power to create agencies to carry out the legislative intent and administer details in matters conducing to the prosperity and usefulness which could not be administered, for obvious reasons, by the Legislature. To such agencies the Legislature does not delegate the power held by it alone to enact laws, but clothes them with the powers of administration of laws created by the Legislature. The act does not seek to give legislative powers to the board of water engineers, but merely created the board and defined its functions and duties." (295 S. W. 650).

In a late case, *Weatherly v. Jackson*, 123 Tex. 213, 71 S. W. (2d) 259, the Texas Commission of Appeals, in an opinion adopted by the Supreme Court, answered the contention that the statute, which vests in the Land Commissioner of Texas the authority to determine whether or not lands included in an application are unappropriated, unsurveyed public school lands, constitutes an invalid delegation of judicial power:

> "In determining that land applied for was unsurveyed school land and therefore subject to sale under the terms of article 5323 and in selling it under that law, the Commissioner was not exercising or attempting to exercise judicial power. He was but acting as an administrative officer in the execution of the law authorizing the sale of the land. Missouri, K. & T. R. Co. v. Shannon, 100

Tex. 379, 388, 100 S. W. 138, 10 L.R.A. (N. S.) 681; Middleton v. Texas Power & Light Co., 108 Tex. 96, 110, 185 S. W. 556; Motl v. Boyd, 116 Tex. 82, 126, 286 S. W. 458; Arnold v. State, 71 Tex. 239, 9 S. W. 120". (71 S. W. (2d) 267).

Again, in *Shaw v. Lone Star Building & Loan Ass'n.*, 123 Tex. 373, 71 S. W. (2d) 863, the Texas Commission of Appeals, in an opinion adopted by the Supreme Court, held that a Texas statute, which authorized the Commissioner of Banking, without court action, to annul a certificate of authority of a building and loan association, did not unconstitutionally delegate judicial power to the Commissioner of Banking, an executive officer.

This court has already had occasion to pass on the provisions of the Texas statutes which vest in the Railroad Commission the authority to prescribe rates for railroads in *Reagan v. Farmers Loan & Trust Co.*, 154 U. S. 362, 38 L. ed. 1014, 14 S. Ct. 1047.

In *Middleton v. Texas Power & Light Co.*, 108 Tex. 96, 185 S. W. 556, the Texas Supreme Court held that the Texas Workmen's Compensation Act, the same statute sustained by this Court in *Middleton v. Texas Power & Light Co.*, 249 U. S. 152, 63 L. ed. 527, 39 S. Ct. 227, vests "no judicial power in the Industrial Accident Board which it creates."

In *F. C. Henderson, Inc., v. Railroad Commission*, 56 Fed. (2d) 218, the constitutionality of Article 6008 in its earlier form (quoted in Appendix "C"), was involved. The statute then provided that natural gas should not be used except for light and fuel purposes, but provided that the Railroad Commis-

sion might permit the gas to be used for other purposes which might be found by the Commission "to be practical and conducive to the public welfare." The validity of this delegation of authority to the Railroad Commission was sustained in that opinion in the following language:

> "* * * It provides for an orderly and careful inquiry into and determination of the question of fact whether there are other uses than those of light and fuel, to which the gas may be put without permitting waste by escape. It delegates to the body charged with the duty, and informed by experience in its discharge, of conserving the oil and gas resources of the state, the fact determination necessary to release a well. *Such delegation to an administrative fact finding body like the Railroad Commission is universally recognized as reasonable, valid and appropriate.* Armstrong v. Whitten (D. C.) 41 F. (2d) 241; United States v. Grimaud, 220 U. S. 506, 31 S. Ct. 480, 55 L. ed. 563; Brazeale v. Strength (Tex. Civ. App.) 196 S. W. 247; Trimmier v. Carlton, 116 Tex. 572, 296 S. W. 1070; City of Denison v. Municipal Gas Co., 117 Tex. 291, 3 S. W. (2d) 794 * * * ." (56 Fed. (2d) 222, Italics ours).

Such cases as *Field v. Clark*, 143 U. S. 649, 36 L. ed. 294, 12 S. Ct. 495; *Buttfield v. Stranahan*, 192 U.S. 470, 48 L. ed. 525, 24 S. Ct. 349; *United States v. Grimaud*, 220 U.S. 506, 55 L. ed. 563, 31 S. Ct. 480; *Monongahela Bridge Co. v. United States*, 216 U. S. 177, 192, 54 L. ed. 435, 30 S. Ct. 356; and *United States v. Shreveport Grain & Elevator Co.*, 287 U. S. 77, 77 L. ed. 175, 53 S. Ct. 42, are to the same effect. Quotation from them should not be necessary to illustrate a rule so well settled.

It has already been shown that the case of *Board of Water Engineers v. McKnight*, supra, is not controlling; and that the same statute, a section of which was involved in the McKnight case, has been repeatedly sustained by the courts of Texas, including the Supreme Court itself.

The other cases cited by the trial court are *Dockery v. State*, 93 Tex. Cr. R. 220, 247 S.W. 508, and *City of San Antonio v. Zogheib*, 70 S. W. (2d) 333. *Dockery v. State* is a criminal case involving the validity of a statute authorizing the fire marshal to prescribe what will constitute adequate fire escapes, in which case it is apparently held that it may not be made a crime to violate an order passed by such an administrative board. This holding is, of course, exactly contrary to the ruling in *United States v. Grimaud* supra.

In the case of *City of San Antonio v. Zogheib*, supra, the other case cited by the trial court, an ordinance of the City of San Antonio was held invalid by the Court of Civil Appeals for the Eleventh District (Eastland), which ordinance vested in the City Commissioners the power to refuse a permit for the erection of filling stations where the safety, health, comfort, convenience, order or good government of the city would be adversely affected by the granting of the permit.

We are at a loss to understand the trial court's reliance on the *Zogheib* case. In the first place, a writ of error has been granted by the Supreme Court of Texas. In the second place, the very same ordinance which was held to be an invalid delegation of legislative and judi-

cial power in the *Zogheib* case was sustained as valid by the Court of Civil Appeals for the Fourth District (San Antonio), a court of co-ordinate jurisdiction with the court which decided the *Zogheib* case, in two cases which were decided several years prior to the Zogheib decision. These cases are *City of San Antonio v. Thompson & Co.*, 23 S. W. (2d) 796, and *City of San Antonio v. Humble Oil & Refining Co.*, 27 S. W. (2d) 868.

In addition, the very same ordinance which was involved in the *Zogheib* case, relied on by the trial court, was sustained by the United States Circuit Court of Appeals for the Fifth Circuit in *City of San Antonio v. Rubin*, 42 Fed. (2d) 107.

But this is not all. In the case of *City of Ft. Worth v. Gulf Refining Co.*, 55 S. W. (2d) 792, the Texas Commission of Appeals, a branch of the Supreme Court of Texas, cited with approval the cases sustaining the San Antonio ordinance. The same thing is true of another opinion by the Commission of Appeals in *Magnolia Petroleum Co. v. Long*, 86 S. W. (2d) 450 at 454. In addition, these cases were cited with approval by the Supreme Court of Texas in the case of *Lombardo v. City of Dallas*, 73 S. W. (2d) 475 at 482, and *City of Ft. Worth v. Gulf Refining Co.*, 83 S. W. (2d) 611.

In other words, the *Zogheib* case, in which the trial court takes consolation, is exactly contrary to the decisions in two other cases by a Court of Civil Appeals which is of coordinate authority with the Court which decided the *Zogheib* case, is exactly contrary to the

ruling of the United States Circuit Court of Appeals. —all of which cases, except the *Zogheib* case, have been many times cited with approval by the Supreme Court of Texas. This disposes of all the authorities cited on this point by the trial court.

It is everywhere recognized that there are many matters which are within legislative competence, but which, on account of the nature of the subject matter, cannot be practically administered by the Legislature itself, on account of the complexities of our modern economic system and everchanging conditions. Such boards as the Interstate Commerce Commission (*New York Central Securities Corp. v. United States*, 287 U. S. 12, 77 L. ed. 138, 53 S. Ct. 45; *Avent v. United States*, 266 U. S. 127, 69 L. ed. 202, 45 S. Ct. 34); the Federal Radio Commission (*Federal Radio Commission v. Nelson Bros. B. & M. Co.*, 289 U. S. 266, 77 L. ed. 1166, 53 S. Ct. 627); the Alien Property Custodian (*United States v. Chemical Foundation, Inc.*, 272 U. S. 1, 71 L. ed. 131, 47 S. Ct. 1), all are examples of Federal boards and agencies created by Congress to carry out and administer the details of legislation enacted by Congress in the scope of its authority.

On this point, we cannot improve on the language of Judge Hutcheson in the case of *Armstrong v. Whitten*, 41 Fed. (2d) 241:

> "It is still fundamentally and broadly true, as it was in simpler times, that this is a government, not of men, but of laws, but it always has been and due to the complexity of modern life is daily becoming more true that, in order for law to be prop-

erly, wisely, and efficiently applied, full provision must be made for its wise administration. It is not necessary to cite cases like United States v. Grimaud, 220 U. S. 506, 31 S. Ct. 480, 55 L. ed. 563; Brazeale v. Strength (Tex. Civ. App.) 196 S. W. 247, that the Legislature may delegate to an administrative board the power to make rules and regulations and to administratively enforce the act committed to their charge, for this principle has become axiomatic in a civilization and under a government such as ours is, and especially is this true with reference to legislative regulations such as the one in question, which not only cannot, but ought not, to be self-operating or self-enforcing, but need and must have administrative application. * * *" (41 Fed. (2d) 246).

3. **No roving Commission is vested in the Railroad Commission by the Act; detailed instructions as to the time and circumstances under which proration is to be initiated are definitely set out.**

What does House Bill No. 266 delegate to the Railroad Commission of Texas that destroys the law? First, the Act (sec. 14) delegates to the Railroad Commission the duty of ascertaining the reasonable market demand for both sweet and sour gas. There is no discretion vested in the Railroad Commission as to whether it will or will not ascertain this fact. The Act itself makes it the mandatory duty of the Commission. Is this provision an unconstitutional delegation of legislative or judicial power? An identical provision appears in the oil conservation statute, and the Commission's power to perform its duties with reference thereto was sustained in the case of *Danciger Oil & Refining Company v. Railroad Commission*, 49 S. W.

(2d) 837, and by a three-judge Federal Court in an opinion rendered by Circuit Judge Hutcheson in the case of *Danciger Oil & Refining Co. of Texas v. Smith*, 4 Fed. Supp. 236.[1]

Certainly it cannot be contended that the ascertainment of the market demand for either oil or gas, a thing which varies from month to month, is a matter which the Legislature itself can determine. If it has the power to order the production of oil or gas restricted to the market demand therefore, and this authority has been recognized *(Champlin Refining Co. v. Corporation Commission; Danciger Oil & Refining Co. v. Railroad Commission of Texas, Danciger Oil & Refining Co. of Texas v. Smith*, as a matter of practical necessity it must delegate to some administrative body the duty of ascertaining the facts. The policy is formulated by the legislative act; the details of ascer-

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[1]Section K of the oil conservation act read: "The term 'waste' shall specifically include * * *(k) the production of crude petroleum oil in excess of transportation or market facilities or reasonable market demand. The Commission is authorized to determine when such excess production exists or is imminent, and to ascertain the reasonable demand."

The Danciger opinion has this language: "No reason presents itself to us for thinking that the Legislature of Texas has less power to prevent waste overground than it has to prevent it underground. Nor do we have any doubt that the enactment of subdivision (k) was intended to, or that it did, fully empower the Commission to prevent such excess production beyond transportation and market facilities as would result in the physical waste of the oil by evaporation or otherwise, or the energy by which it is brought to the surface and saved. * * *" (4 Fed. Supp. 236).

taining the facts to carry the legislative policy into effect are administered by a subordinate body.

Second, House Bill No. 266 directs the Railroad Commission, when it has ascertained the market demand for gas, to enter an order restricting the total production from a common source of supply to an amount equal to the market demand so found. The discussion just concluded should demonstrate clearly that this constitutes no unlawful delegation of authority. The Act leaves no discretion in the Railroad Commission as to whether it will or will not restrict the total production from a common source of supply to the market demand for such gas. (Sec. 14, Appendix "A").

Third, when the Commission has entered an order restricting the total production from a common source of supply to the market demand for such gas, it is then made the duty of the Commission to allocate the total allowable production among the various wells in the field on a reasonable basis (Sec. 14) and as set forth in Section 13. Section 13 requires the Commission, in determining the daily allowable production for each gas well, to take into account the size of the tract on which the well is located up to the efficient drainage area of such well, and the relative producing ability of the well as compared with the aggregate producing abilities of all the wells producing the same kind of gas in the common reservoir. In other words, the Commission, in allocating the allowable production among the various wells in the field, is instructed to take into account (1) the relative potentials of the

wells, and (2) the size of the tracts on which the wells are located.

Does this constitute an unlawful delegation of authority? An allocation of a total field allowable among the various wells on the basis of the relative potentials of the wells is a familiar practice in oil proration. Such a method of allocation was sustained in the case of *Champlin Refining Co. v. Corporation Commission*, supra; in *Danciger Oil & Refining Company v. Railroad Commission*, supra; in *Danciger Oil & Refining Company v. Smith*, supra; and in *Amazon Petroleum Corp. v. Railroad Commission*, supra. An oil proration order which combined the factors of potential and acreage (just as House Bill No. 266 provides for) was sustained in the case of *Boxrollium Oil Co. v. Smith*, 4 Fed. Supp. 624.

If there is any difference between the oil conservation statutes (which have been uniformly held to contain valid delegations of power) and House Bill No. 266, with reference to the question now under discussion, the difference is altogether in favor of House Bill No. 266.

First, the general oil and gas conservation statute leaves it to the discretion of the Commission as to whether it will ascertain the reasonable market demand for oil and restrict the total production to the amount found to represent the market demand. (See subdivision (j) ante p. 34, and Sec. 7, ante p. 38). House Bill No. 266 vests no such discretion in the Commission. It makes mandatory the restriction of sweet gas

production to the reasonable market demand. (Sec. 14, Appendix "A"). When an oil proration order is entered finding the market demand, and restricting the total production to the amount so found, it is done because the Railroad Commission in its discretion has decided it ought to be done to prevent waste. When the Railroad Commission, acting under House Bill No. 266, finds the market demand for gas and enters an order restricting the total production to that figure as in the instant case, it does so because the Legislature told the Commission to do it, not because the Commission in its discretion decided it ought to be done. Yet the broad discretion on this point vested in the Railroad Commission in the general conservation statute has been uniformly held to constitute no unconstitutional delegation of authority. *Danciger Oil & Refining Co. v. Railroad Commission*, 49 S. W. (2d) 837; *Danciger Oil & Refining Co. v. Smith*, 4 Fed. Supp. 236.

Second, the oil and gas conservation statute, instead of instructing the Commission in detail as to the factors which it shall take into account in allocating the production among the various wells in the field, simply provides that the total allowable shall be allocated among the various wells "on a reasonable basis.[1]

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[1]Such language, especially when considered in view of the balance of the Act, and in the light of reenactments, and of court decisions, as well as administrative interpretation, over a period of years, carries with it the implication or meaning that the allocation shall protect property rights, without unreasonable discrimination, as far as may be done consistently with prevention of waste, thus constituting allocation "on a reasonable basis."

(ante, p. 38). The Railroad Commission, under the general provisions of the oil and gas statute, unquestionably has a great deal of latitude in determining what factors it will take into account in allocating the total allowables among the oil wells in this state in order to protect property rights and thereby effect distribution on "a reasonable basis." As a result of this latitude as to oil regulation, it appears that in some fields the allocation is made altogether on a basis of relative potentials *(Danciger Oil & Refining Co. v. Railroad Commission, supra,* and in other fields it is made on a combination of potential and acreage *(Boxrollium Oil Co. v. Smith, supra)*. The same thing is not true of the allocations required of the Railroad Commission by House Bill No. 266. House Bill No. 266, in addition to requiring that the Railroad Commission allocate the allowable production on a reasonable basis (which is where the general oil and gas conservation statute stops), goes further and specifically instructs the Commission what factors it shall take into account in making the allocation.

Thus, there is much less delegation of authority and discretion to the Ralroad Commission in House Bill No. 266 than appears in the general oil and gas conservation law. Yet the proration orders of the Railroad Commission promulgated pursuant to the general oil and gas conservation law have never been held invalid as unconstitutional exercises of legislative or judicial authority.

If, as the trial court indicates in its opinion (R. 158), the Legislature of Texas probably would have

the power to set up a system actually partitioning gas in place and restricting the total production of each operator to the gas he was thus found to own, a matter which is not involved in this case, then surely it must be said that the Legislature had the right to select a less far-reaching remedy, to-wit, that of simply regulating the day-to-day withdrawals from the common pool of each owner of the surface, so that in a degree equity and justice will be accorded to each owner of a common source of supply. Such regulation may be temporary, or for a period of years. Its character changes from month to month. The regulation does not purport to settle title questions or boundaries in a manner to support a plea of res judicata as to such issues. Should the statute undertake to place on the courts the burdens which are cast on the Commission, and which are implied by the trial court to be judicial functions, it is almost certain that the courts would refuse to accept the burden, holding that such regulation was purely administrative, and the duties should be imposed on an executive or administrative officer or board, not the courts.

4. Standards fixed by House Bill No. 266 are sufficiently definite.

While the point was not passed on by the trial court appellees pleaded that House Bill No. 266 was invalid in that the act is vague, indefinite and uncertain in meaning (1) in so far as it directed the Railroad Commission to ascertain the reasonable market demand for sweet gas; (2) in so far as it directed the Railroad Commission to allocate the allowable pro-

duction among the various sweet gas wells in the field; and (3) in so far as it directed the Commission to prorate and regulate the production of natural gas for the protection of public and private interests and in the adjustment of the correlative rights and opportunities of each owner of gas in a common reservoir to produce and use or sell such gas as is permitted to be produced under the terms of the Act.

It should be clear that appellees' complaint in this regard is without foundation. Certainly it cannot be reasonably contended that the market demand for sweet gas is a thing which an administrative body cannot determine. In this particular case the ascertainment was made by the Commission by requiring each person who desired to purchase or use sweet gas from the Panhandle gas reservoir to file with the Commission sworn nominations of the amount such person desired to purchase or use from said reservoir for the ensuing month. (R. 492). As we have already had occasion to point out in this Brief, restriction of production of oil to market demand is a familiar practice in many oil states. The methods used by various administrative bodies in ascertaining such a fact may vary depending on local conditions, but that the market demand for gas or for oil is a fact which is capable of ascertainment must be obvious.

Since the amount of the market demand of gas is ascertained by an administrative body and is not left to the judgment or guess of the operators who are to be affected by an order issued by the Commission, it is clear that appellees and the other operators in the field

affected by the law are not left to speculate at their peril as to the amount of the market demand for sweet gas. It is a fact which is determined by the Railroad Commission itself, and the Commission's order finds in cubic feet the amount of market demand for such gas. A similar complaint was made in the case of *Danciger Oil & Refining Company v. Railroad Commission*, 49 S. W. (2d) 837. The opinion overruled the contention in the following language:

> "Nor do we sustain appellant's contention that the orders complained of violate the Fourteenth Amendment to the Federal Constitution. The operator's right to produce, and the amount which he may produce, is not, as contended by appellant, made to depend upon the uncontrolled consent and economic desire of the purchaser. It is definitely and specifically fixed by the maximum allowed by the commission for the district. It is not left to the producer to determine what the "market demand" is. If the duty were imposed upon the operator to ascertain the market demand, and to curtail his production accordingly, a different question would be presented. The amount of the market demand is but the quantity of oil that the purchasers and consumers normally absorb at the prevailing price, whatever that may be. The commission had the power and the information at its disposal with which to determine with reasonable certainty what that amount was. We are not seriously concerned with the detailed means by which that fact was ascertained. Suffice it to say that it was a matter capable of reasonably definite ascertainment. If the commission had authority to regulate production according to that standard clearly it had the duty and authority to ascertain through proper methods which

were available to it, as a fact-finding function, what that demand was at any given time. Whatever, therefore, was indefinite in the power vested in the commission, was rendered definite, in the delegation to it of the authority to ascertain the facts. * * *

"And so with the contention that the term "market demand" is too indefinite and uncertain to form any basis of regulation. If left to the determination of the producer or operator, and his guilt or innocence made dependent upon his ascertainment of that standard and his compliance with it, the cases cited, where the burden of that determination was placed upon the accused, might apply. See Cline v. Frink Dairy Co., 274 U. S. 445, 47 S. Ct. 681, 71 L. ed. 1146; Int. Harvester Co. v. Kentucky, 234 U. S. 216, 34 S. Ct. 853, 58 L. ed. 1284. But this rule does not apply where the determination of such definite standard is delegated to a qualified agency of the state with facilities available to it to ascertain the necessary facts by which to fix such standard."

A similar situation was presented in *United States v. Shreveport Grain & Elevator Co.*, 287 U. S. 77, 77 L. ed. 175, 53 S. Ct. 42, which involved a federal statute which made it unlawful to ship in interstate commerce any article of fruit or drugs which was adulterated or misbranded. The act provided that an article of food should be deemed to be misbranded "if the package form, the quantity of the contents be not plainly and conspicuously marked on the outside of the package in terms of weight, measure, or numerical count; provided, however, that reasonable variations shall be permitted, and tolerances and also exemptions as to small packages shall be established by rules and

regulations made in accordance with the provisions of Sec. 3 of this act."

This court held in the opinion rendered by Mr. Justice Sutherland that in view of the fact that the variations, tolerances and exemptions provided for were made definite by the issuance of administrative orders, the statute was not subject to the objection of being too vague and indefinite to be enforceable. The opinion has this language:

> "We construe the proviso simply as giving administrative authority to the Secretaries of the Treasury, Agriculture, Commerce and Labor to make rules and regulations permitting reasonable variations from the hard and fast rules of the act and establishing tolerances and exemptions as to small packages, in accordance with Sec. 3 thereof." (287 U. S. 82).

We have already shown by the discussion appearing ante pages 164 to 169 that the provisions of House Bill No. 266 in providing the standards which the Railroad Commission shall apply in allocating the allowable production among the various wells in a gas field are entirely definite, consistent with the necessity of leaving some discretion in the administrative body to cope with varying conditions which may be encountered in different gas fields. We have also shown that the legislative directions in this particular are much more definite than those that appear in the oil and gas conservation statute, which last statute has been uniformly upheld by every court which has had occasion to pass on the same. It is not necessary to repeat ourselves on this point.

Insofar as appellees' claim that the expression "public and private rights" and "correlative rights and opportunities" are too vague and indefinite, no argument should be needed. These expressions appear in section 10 of the Act which is simply a legislative declaration of purpose. The duty of the Railroad Commission to carry the act into effect is not dependent on any ascertainment by it of what are public or private rights and when correlative rights and opportunities of each owner of gas should be adjusted or protected. The Legislature itself in plain terms has laid out the duties of the Commission in regard to these matters. In Section 11 of the Act the Commission is instructed to promulgate orders in the prevention of waste whenever the presence or imminence of waste is supported by a finding based upon evidence at a hearing held by the Commission. In the same Section and Section 14, the Commission is instructed to ascertain the daily reasonable market demand for gas whenever the evidence introduced at a hearing shows that the aggregate lawful volume of the open flow of daily potential capacity to produce of all gas wells located in a common reservoir is in excess of the daily reasonable market demand for gas from such wells, and the Commission is then instructed to enter an order restricting the total production of gas from all the gas wells in the field to an amount equal to the market demand as ascertained by the Commission. Appellees have no need, therefore, and neither does the Railroad Commission to puzzle themselves as to the meaning of "correlative rights and opportunities". The duty of the Commission is made plain to restrict the total production from the reservoir to the market demand for gas whenever

the total potentials of all the wells is in excess of what the market will absorb. The Legislature has said in the Act that it is instructing the Commission to perform these duties "in the adjustment of the correlative rights and opportunities of each owner of gas in a common reservoir to produce or sell such gas as permitted in the article", which is simply a legislative expression of the purpose that the Legislature had in instructing the Commission to perform its duties in these particulars.

The statute here involved details definite steps of procedure, for hearing after due notice, and for judicial review of any rule, order or regulation promulgated by the Railroad Commission, an administrative body created by the Texas laws. No discretion is vested in it as to how, when or under what circumstances regulation is to take effect. Latitude is restricted to a bound falling far short of what might lawfully be exercised.

The California statute involved in *Bandini Petroleum Corporation v. Superior Court*, 284 U.S. 8, 76 L. ed. 136, 52 S. Ct. 103, prohibited the *unreasonable* waste of gas. It was there upheld as sufficiently definite and certain, and also in *People v. Associated Oil Co.*, 211 Cal. 93, 294 Pac. 717. A Texas statute denouncing contracts reasonably calculated "to fix the price of commodities" or which tend to accomplish the prohibited results was upheld as affording a sufficiently definite standard in *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 86, 53 L. ed. 417, 29 S. Ct. 220. Likewise, the phrase, "except in case of emergency", in *B. & O. Ry. Co. v. I. C. C.*, 221 U. S. 612, 55 L. ed. 879, 31

S. Ct. 621; "payment of a reasonable rental" and "oppressive agreement" in *Levy Leasing Co. v. Siegel*, 258 U. S. 242, 66 L. ed. 595, 42 S. Ct. 289; the duty of hotel keepers in case of fire" to do all in their power" to save guests and inmates in *Miller v. Strahl*, 239 U.S. 426, 60 L. ed. 364, 36 S. Ct. 147. See also *Hygrade Provision Co. v. Sherman*, 266 U. S. 497, 69 L. ed. 402, 45 S. Ct. 151; *Campbell v. City of New York*, 155 N. E. 628, 50 A.L.R. 1473; *Nash v. United States*, 229 U. S. 373, 57 L. ed. 1232, 33 S. Ct. 780; *Omeachevarria v. Idaho*, 246 U. S. 343, 62 L. ed. 763, 38 S. Ct. 323, *State of Texas v. T. & P. Ry. Co.*, 105 Tex. 20, 154 S. W. 1159; *Dallas Ry. & Terminal Co. v. Bankston*, 51 S. W. (2d) 305.

The word "reasonable" as modifying the term "market demand" neither adds nor detracts from the power granted to the Commission. In all events its findings as to market demand are subject to the criterion of reasonableness.

IV.

The effect and operation of the orders tend to accomplish the purpose of the statute.

1. The orders follow the statute.

House Bill No. 266 directs the Railroad Commission to prorate production of gas in the prevention of waste when the fact of the presence or imminence of waste is supported by a finding based on evidence and in the adjustment of correlative rights when the evidence will support a finding that the aggregate lawful volume of the open flow or daily potential ca-

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pacity to produce of all gas wells located in a common reservoir is in excess of the daily reasonable market demand for gas to be utilized as permitted in the Act. (Sections 10 and 11). The Commission shall determine the aggregate daily capacity of all gas wells in a common reservoir and the market demand for such gas during the following month. (Section 12). In determining such daily allowable production the Commission shall consider (1) acreage, not in excess of an efficient dranage area, to be determined by the Commission, and (2) potentials, or the relation between daily producing capacity of each gas well and the aggregate daily capacity of all gas wells producing the same kind of gas. The Commission, in ascertaining such drainage area, shall take into account such factors as are reflected in the productive capacity of a gas well, including formation pressure, permeability and porosity of the producing formation, and structural position and all other factors taken into account by a reasonably prudent operator in determining such drainage area. (Section 13). It shall be the Commission's duty to determine the reasonable market demand for both sour and sweet gas, and restrict production to an amount which may be produced without waste, and in any event to the amount of the reasonable market demand therefor. (Section 14). The Commission may zone a common reservoir, and segregate a sour gas area from a sweet gas area, but is not required to restrict the allowable production of the sour gas zone to the same percentages that may be produced from the sweet gas zone. (Section 19).

The Railroad Commission has zoned the Panhandle

field into an East and West field (R. 486-487), and has segregated the sweet and sour gas areas in such field. (R. 487-488). Upon evidence adduced it has found that the aggregate lawful volume of open flow or daily potential capacity to produce both sweet and sour gas exceeds the daily reasonable market demand for both classes of gas. (R. 490). The Commission has determined an efficient drainage area for each zone, and allocated the total field allowable among the various wells on the basis of fifty per cent on well potentials and fifty per cent on acreage. The findings in the Commission's order of December 10, 1935, are elaborate and detailed. (R. 476-496). This order is adopted as a base order by the Commission in subsequent orders. (R. 497-499, 555-558). An examination of such orders reveals that the Commission has followed the provisions of House Bill No. 266, and that its orders are in accord with the purposes and intent of the Act. The order of December 10, 1935, was drafted after extended hearings by the Commission in which hearings the facts found therein were fully developed by qualified engineers and practical operators. It would unduly lengthen this Brief to quote extended portions of these orders for direct comparison with the provisions of the statute, but we confidently assert that a careful examination of the statute and orders will lead to the conclusion that the Commission has tracked the statute, and that the orders are fully supported by the findings therein.

2. **The burden of overcoming the presumption of validity attaching to the statute and orders rests heavily upon the appellees.**

We do not deem it necessary to long labor the point that if the order of the Railroad Commission bears a reasonable relation to the prevention of waste as defined by House Bill No. 266, and if the enforcement of the order will result in a greater ultimate recovery of gas from the reservoir, it is entirely valid. Its validity under these circumstances is supported by a host of authorities, including *Champlin v. Corporation Commission*, *Bandini Petroleum Co. v. Superior Court*, and *Ohio Oil Company v. Indiana*. We contend that the ratable production features of House Bill No. 266 and the orders of the Railroad Commission carrying the same into effect will result in a substantially greater ultimate recovery of gas from the Panhandle gas reservoir than would be recovered if appellees and those similarly situated are permitted to produce from their own wells all of the sweet gas which is produced from such reservoir. In our later discussion we will point out the absence of conflict in the evidence on this point, although on the issue of the effect of the presence of water in the reservoir upon the ultimate recovery of gas the record does present some disputed issues of fact.

House Bill No. 266 not only defines waste but vests in the Railroad Commission the authority to make and enforce rules for the conservation of natural gas and to prevent the waste thereof as defined in the Act. (Section 6). It is our contention that it was incumbent upon the trial court to follow the findings of the Commission contained in the orders to the effect that waste would be prevented by the enforcement of ratable production as provided for in said order, unless the trial court also found from the evidence intro-

duced at the trial that the order of the Commission was so arbitrary and unreasonable as to be beyond the pale of its discretion, and therefore void. In these cases in so far as they are in the nature of appeals from the orders of the Railroad Commission, the burden is on the appellees to prove as a matter of law that the orders of the Commission are confiscatory, unreasonable and unjust, in the sense that it is beyond the constitutional and statutory powers of the Commission, or that the Commission had no evidence before it to support such an order, or that in the light of the evidence adduced before the court its action was so arbitrary and unreasonable as to be beyond the pale of its legislative discretion. Such proof must be clear and convincing and the findings must be plainly shown to be over-borne. *Los Angeles G. & E. Corp. v. Railroad Commission*, 289 U. S. 287, 77 L. ed. 1180, 53 S. Ct. 637; *Dayton P. & L. Co. v. Pub. Utilities Com.*, 292 U. S. 290, 78 L. ed. 1267, 54 S. Ct. 647; *Cincinnati N. & O. T. Ry. Co. v. I. C. C.*, 162 U. S. 184, 40 L. ed. 935, 16 S. Ct. 700; *Ex Parte Young*, 209 U. S. 123, 52 L. ed. 714, 28 S. Ct. 441; *Lindheimer v. Illinois Bell Telephone Co.*, 292 U. S. 151, 78 L. ed. 1182, 54 S. Ct. 658; *Tagg Bros. & Moorehead v. U. S.*, 280 U. S. 420, 444, 74 L. ed. 524, 537, 50 S. Ct. 220. Even in a review of the rate making agencies where confiscation is alleged, the court will not disregard the weight which properly attaches to findings upon hearing and evidence. *St. Joseph Stockyards Co. v. U. S.*, —*U. S.*—, 80 L. ed. 685, 56 S. Ct. ——. Upon the strength of the provisions of the Interstate Commerce Act which provide that the findings and orders of the Interstate Commerce Commission shall be prima

facie valid, the courts have developed the doctrine to its present state, which is that the orders and findings of the Commission are prima facie valid, just, reasonable and correct; that such findings and orders are final unless the party complaining thereof discharges the burden of proof that under the entire evidence submitted before the Commission the order was: (1) beyond the power which it could constitutionally exercise; (2) beyond its statutory power; (3) based upon mistake of law effecting the final result; (4) that the rate is confiscatory; (5) that the Commission's act is so contrary and unjust as to fix rates contrary to the evidence or was without evidence to support its findings; or (6) that the authority has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance and not the shadow determines the validity of the exercise of the power. *I. C. C. v. Union Pacific Ry. Co.*, 222 U. S. 541, 56 L. ed. 308, 32 S. Ct. 108.

The court does not sit as a board of revision to substitute its judgment for that of the Legislature or its agents as to matters within the province of either. *St. Josephs Stockyards Co. v. United States,* supra; *People of the State of New York ex rel. N. Y. & Queens Gas Co. v. McCall,* 245 U. S. 345, 62 L. ed. 337, 38 S. Ct. 122; *Florida v. U. S.*, 282 U. S. 194, 75 L. ed. 291, 51 S. Ct. 119; *Brown v. Humble O. & R. Co.*, 87 S. W. (2d) 1069, (on rehearing); *Clymore Production Co. v. Railroad Commission,* 13 Fed. Supp. 469, 11 Fed. Supp. 791.

In the leading case of *Radice v. New York,* 264 U S. 292, 68 L. ed. 690, 44 S. Ct. 325, Mr. Justice Sutherland said:

"Where the constitutional validity of a statute depends upon the existence of facts, courts must be cautious about reaching a conclusion respecting them contrary to that reached by the Legislature; and if the question of what the facts established be a fairly debatable one it is not permissible for the judge to set up his opinion in respect of it against the opinion of the law maker." (264 U. S. 294).

Again, in *Bayside Fish Flour Co. v. Gentry*, ___ U. S. ___, 80 L. ed. ___, 56 S. Ct. 513, this Court, answered the argument urged against the validity of the California statute which regulated the canning and packing of sardines as follows:

"* * * * but at most these arguments do no more than demonstrate that the question is debatable. And, if so, the effect of the action of the state Legislature in passing the statute was to decide this debatable question against the view now advanced by appellant; and since we are unable to say that such a determination by the Legislature is clearly unfounded, we are precluded from overturning it."

In *Williams v. Baltimore*, 289 U. S. 36, 77 L. 1015, 53 S. Ct. 431, Mr. Justice Cardozo said:

"The judicial function is exhausted with the discovery that the relation between means and end is not wholly vain and fanciful, an illusory pretense. Within the field where men of reason may reasonably differ, the Legislature must have its way." (289 U. S. 42).

And in *Standard Oil Co. v. City of Marysville*, 279

U. S. 582, 73 L. ed. 856, 859, 49 S. Ct. 430, this Court (per Justice Stone) used this language:

> "We need not labor the point, long settled, that where legislative action is within the scope of the police power, fairly debatable questions as to its reasonableness, wisdom and propriety are not for the determination of courts, but for that of the legislative body on which rest the duty and responsibility of decison. * * *
> "We may not test in the balances of judicial review the weight and sufficiency of the facts to sustain the conclusion of the legislative body, * * *." (279 U. S. 584).

And in *Borden's Farm Products Co. v. Ten Eyck*, 296 U. S. , 80 L. ed. 469, 56 S. Ct. 453, Mr. Justice Roberts used this language:

> "Judicial inquiry does not concern itself with the accuracy of the legislative findings, but only with the question whether it so lacks any reasonable basis as to be arbitrary."

The rule to be adduced from the above decisions applies as much to the order of an administrative board as it does to a statute passed by the Legislature of a state. This is definitely settled by the late case of *Pacific States Box & Basket Co. v. White*, 296 U. S. 176, 80 L. ed. 133, 56 S. Ct. 159, 101 A.L.R. 853.

House Bill No. 266 provides that any person may appeal for judicial review from any rule, order or regulation of the Commission made or promulgated under the authority conferred by the statute in the same manner, upon the same conditions and to the same court as prescribed for appeals from other rules pro-

mulgated under the general conservation statutes of the State. Sec. 8 of Article 6049c (Vernon's Revised Civil Statutes of 1925, as amended) provides that any interested person affected by the conservation laws of this State relating to crude petroleum oil or natural gas and the waste thereof, or by any rule, regulation or order made or promulgated by the Commission thereunder, shall have the right to sue in a court of competent jurisdiction in Travis County, Texas, to test the validity of said laws, rules, regulations or orders. In all such trials the burden of proof shall be upon the party complaining of such laws, rules, regulations or orders and such laws, rule, regulation or order so complained of shall be deemed prima facie valid.

In *Brown v. Humble Oil & Refining Company*, 87 S. W. (2d) 1069, (on motion for rehearing), the Supreme Court of Texas said with reference to the validity attaching to the orders of the Railroad Commission as to oil and gas matters:

> "All questions of fact are primarily for the commission to determine.
> "We held in the original opinion, and reiterate it here, that the Legislature enacted certain laws which declare the public policy of the state with respect to the development and conservation of oil and gas, and placed the duty upon the Railroad Commission to carry out the details. The duty is lodged with the Railroad Commission to make rules to carry out the mandates of the Legislature, and to impartially enforce them. In the exercise of its power to grant exceptions to its rules, it is the duty of the commission to treat all interested parties justly, fairly, and impartially under all the facts and circumstances of the case;

and the actions and rulings of the commission in attempting to accomplish such results will not be disturbed by the courts, unless they are clearly illegal, unreasonable, or arbitrary. All rules and rulings of the Railroad Commission are presumed to be valid until the contrary is made to appear. If a rule of the commission is found to be illegal or invalid by a court of competent jurisdiction, such court may so adjudge. The court cannot substitute a new rule for the one adjudged invalid. That power rests exclusively with the Railroad Commission."

In addition, we direct the attention of the court to the decision of the Supreme Court of Texas in *Shupee v. Railroad Commission*, 123 Tex. 521, 73 S.W. (2d) 505,[1] in which this principle is reiterated in discussing the laws governing trucks and buses in Texas; and the opinion of the Court of Civil Appeals in the same case *Railroad Commission v. Shupee*, 57 S. W. (2d) 295, and also *State et al v. Lone Star Gas Co.*, 86 S. W. (2d) 484, where the matter is exhaustively discussed.

The presumption of validity which must attach to the orders of the Railroad Commission, an administrative agency, is made even stronger when, as in this case, they are promulgated after due notice and hearing. *Pacific Coast Box & Basket Co. v. White*, supra.

Further, in the instant case appellees were represented by their attorneys and agents and experts at

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[1]The Texas statute relating to appeals from orders of the Railroad Commission as to the operation of trucks and buses requires only a preponderance of the evidence to overcome the presumption of validity attaching to the order. (Art. 911A Vernon's Revised Civil Statutes of Texas, 1925, as amended).

the hearing held at which the evidence was adduced upon which the findings were made and the orders promulgated. (R. 290). They offered no evidence, voiced no opposition at such hearing "where the opportunity was open." Such course of conduct is not approved. *Manufacturers R. Co. v. U. S.* 246 U. S. 457, 470, 488-490, 62 L. ed. 831, 837, 847, 848, 38 S. Ct. 383.

3. The enforcement of the orders will minimize loss of gas due to water encroachment.

House Bill No. 266 defines waste, among other things, to specifically include:

> "(b) The drowning with water of any stratum or part thereof capable of producing gas in paying quantities;
>
> "(c) Underground waste or loss however caused and whether or not defined in other subdivisions hereof; * * *
>
> "(f) Physical waste or loss incident to or resulting from so * * * operating well or wells as to reduce or tend to reduce the ultimate recovery of gas from any pool."

The Act vests the Railroad Commission with authority to make and enforce rules or orders for the conservation of natural gas and to prevent the waste thereof, as defined in the Act. (Sec. 6).

The findings of the Railroad Commission contained in the order of December 10, 1935, are elaborate

and detailed with reference to the presence and effect of the water in the Panhandle reservoir.[1]

The trial court found that no hydraulic drive is exerted by water found below the oil and gas in the same formations, and that the water does not flow in to replace the oil and gas produced at a sufficiently

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[1]"Water contained in the same strata or zone which is adjacent to an oil or gas deposit is called 'edge water', and the force that this water imparts to the oil or gas deposit is called 'water drive.' In the various fields in Texas, edge water imparts a force from a few hundred pounds per square inch in some fields up to pressure in excess of 2500 pounds per square inch in other fields. Where the volumetric withdrawals from a reservoir is greater than the encroachment of the edge water, the pressure of the reservoir decreases proportionately. Unless the edge water pressure or water drive is substantially controlled by uniform withdrawals from a common reservoir, water channeling and water coning will result, and have resulted, in the trapping of oil and gas deposits which may never be recovered, thereby causing underground waste.

"The oil and gas in the Panhandle Field is under a hydrostatic water drive pressure, and the water adjacent to the oil and gas has a nearly constant composition. In the initial stages of development of the field the water pressure imparted to the oil and gas body a pressure of 430 pounds per square inch. But since the volumetric amounts of oil and gas withdrawals in certain parts of the field have greatly exceeded the ability of the water to encroach, this condition has developed low pressure areas in regions of greatest withdrawals. The rapid withdrawals in various parts of the field have caused an irregular uneven encroachment of the water, resulting in water channeling and water coning in several places, thereby creating conditions of waste. The testimony shows that there are a number of oil and gas wells in this field which were formerly free from water, and which are now producing water in varying amounts." (R. 484).

rapid rate to rebuild the pressure to any perceptible degree, and in fact finds that by reason of the absence of hydraulic drive that all the Panhandle field is rendered free of the hazards of water coning, water channeling and trapping off of oil and gas as a result of its rapid production of oil and gas which sometimes occurs in a field in which an active water drive is present. (R. 171-172).

It is the contention of the appellants, irrespective of the technical terms which may be applied to the effect and operation of water in the Panhandle field, that the water in the field does exert an active force intruding and encroaching at a rate not sufficiently rapid to maintain a constant pressure in the reservoir, but to cause such a condition as to create a serious water problem to both oil and gas operators, which conditions the effect of the orders will tend to alleviate by requiring ratable production. (R. 301-302, 359).

There is no dispute in the record that the original or virgin pressure in the Panhandle field of 430 pounds is the result of the hydrostatic pressure exerted by the water which underlies oil and gas;[1] and that this water has its outcrop somewhere in the Wichita Mountains in Oklahoma approximtely 1000 feet above sea-level; or that a column of water 1000 feet high will exert a pressure of 430 pounds. There is no dispute that bottom water does exist in the reservoir.

The record shows that of the 2597 oil wells in the Panhandle field, 645 wells are now making water,

[1]For a general explanation of the original and stratographic arrangement of oil, gas and water see R. 483 (a).

which water wells are distributed throughout the field. Exhibit 44 (R. 537) lists these wells by counties as follows:

County	No. Wells	Amt. water barrels	Avg. bbls.	Amt. oil bbls.	Avg. bbls.	Water production %
Carson	88	658	7.5	1302	14.8	33.6%
Gray	170	7045	41.4	4366	25.7	61.7
Hutchinson	322	18261	567.	5297	16.5	77.5
Moore	12	3401	285.4	930	77.5	78.5
Wheeler	53	1061	.20	739	13.9	58.9
Totals	645	30426	47.2	12634	19.6	70.7%

The record further shows that, of the 67 oil wells in the field operating on special water exemptions (that is, wells which are permitted to produce extra amount of oil on account of their water problems), 50 of these wells were producing more water in November, 1935, than they were in January, 1932, a condition which is entirely incompatible with the contention that the water in the Panhandle field is in the class of entrapped water as distinguished from water which is actually encroaching. (R. 538).

The record further shows that while the Railroad Commission has never made a general test of the gas wells in the field for the purpose of determining which wells are producing water, it did make a general potential test of all the wells in the field in the summer of 1935, and that without instruction from the Commission to do so, the agents of the Commission making the test noted on some 45 or 50 of the gas wells tested that the wells had a show of water along with the gas.

(R. 304). When this situation developed, the Commission's agents re-tested these particular wells and 31 of them continued to produce appreciable quantities of water after the wells had produced for twenty minutes. (R. 304). The water from 18 of these gas wells was definitely determined to be bottom hole water (R. 554), as distinguished from water which might have found its way through the well hole from a higher horizon.

Based on these and other facts, the witness Cottingham, Director of Production for the Railroad Commission of Texas, testified as follows:

> "The present water situation in the Panhandle field presents a rather irregular picture so far as the general picture is concerned, because of the fact that there are a great number of low pressure areas, and if you will consult the map, you will see the places of the most concentrated withdrawals the worse water situation and that is to be expected. * * * On the south side of the field, there being practically no possibilities from the present outlook for oil, it is expected that you will have only a gas-water contact and, if in the future there are concentrated withdrawals along west and the south flank of the field similarly to what has already occurred in the north side of the field, you will have a very irregular water encroachment which will cause water channeling and coning, resulting in the entrapping of gas and oil.
> * * *
>
> "I find that where there are heavy concentrated withdrawals throughout the gas area that water intrusion is found." (R. 305-306).

Mr. Cottingham was then interrogated as to the ef-

fect of concentrated withdrawals in the gas field on the water situation. He testified that concentrated, non-uniform withdrawals of gas

> "* * *will result in water coning and channelling; any irregular withdrawals will cause water channelling where you have any kind of water drive at all.
> * * *
>
> "It will cut down the ultimate yield of the gas in two ways: One, you will have water coning and channelling and entrapping off of saturated sections of horizon and, second, you will have water coning into your well bore before the abandonment pressure is reached, cutting the gas off from the avenue of escape through the well bore and leaving large quantities back in the reservoir which will never be recovered." (R. 307).

Appellees' witnesses, in joining issue on the question of whether or not there is an active pressure exerted by the water in the Panhandle field, were careful to qualify their terms. The witness Camp, in testifying that there is not an active water drive in the field, said:

> "By water drive or hydrostatic drive is meant the active encroachment of water which tends to maintain a *constant pressure* due to a flowing in of water to replace oil or gas which is taken out of the reservoir." (R. 243).

Similarly, the witness Gill, in denying the existence of what he called a "hydraulic drive" in the field, defined that drive as one which will keep up the pressure in the field. (R. 283-284). He admitted, how-

ever, that there is some movement of water into the field. (R. 290).

The witness Hughes testified:

> "If there were an active water drive, the water would keep the pressure up and continue to rise to the height that it originally did." (R. 233).

In other words, appellees' witnesses content themselves with saying that there is no such active water drive in the Panhandle field which is sufficient to maintain a constant pressure of 430 pounds, the original pressure, during the producing life of the field. The defect in this testimony is that appellants have never contended that the water is able to replace the oil and gas withdrawn rapidly enough to maintain the pressure in the field to the level it was when the field was discovered. (R. 301,359). Indeed, the maintenance of a constant pressure is not a characteristic of many oil and gas fields where admittedly the principal propulsive force is the hydrostatic pressure of the water. The East Texas oil field is a typical example of such a field. The fact remains, nevertheless, that in such fields it is advisable as a waste prevention measure to produce the oil or gas uniformly over the field and at comparatively slow rates to prevent premature water encroachment, the coning and channeling of water, and the entrapment by water of oil and gas producing sands.

It is wholly immaterial that the water head may not be an active water drive in the sense that it is sufficient to maintain virgin pressures as oil and gas are produced.

Viewing the situation from a purely practical standpoint and from the standpoint of the practical operator, that water is already a serious problem in connection with the production of oil in the Panhandle field is undisputed in the record. That water is becoming a serious problem in the production of gas is shown by the testimony of appellants' witness Fowlston, Superintendent of Production for the Northern Natural Gas Company, a practical operator as well as a technical expert. With reference to the water situation this witness testified as follows:

> "Q. Have you any information which you can give to the Court with reference to any of the wells of the Northern Natural that are making water at this time?
>
> "A. Yes, sir."
>
> "Q. Gas wells?
>
> "A. Yes, sir, I have no data with me so I will have to take it from my memory, but we have two wells in the White Deer area, known as our No. 1 McEwen, in Section 1, Block 4, I. & G. N., Carson County, and our No. 1 Frashier, in Section 177, Block 3, Gray County, that were completed about 1930 as dry gas wells; they were completed approximately 150 feet above sea level. The eight inch casing was properly cemented in the holes. These wells were produced as gas wells and showed no water until about the last year. They are now producing a heavy spray of water when the wells are opened and the water will continue to spray as long as the well is open, and the open flow of the well is approximately one-half of what it originally was.

"They were completed about 150 feet above sea level. Generally the sea level constitutes the water level in the Panhandle field. There was no bad workmanship in connection with the drilling of these wells that I know of. I am sure there wasn't, and the wells didn't show any water for over four years.

"My only accounting for the presence of water in these wells at this time is that the heavy withdrawals of gas in the areas where the wells are located have brought water into the areas. * * * There are some Texoma wells immediately adjacent to that area.

"These wells do not appear on the Commission map as gas wells containing water; I don't know that the Commission is officially advised of it. When a well begins to show water and the meter chart shows that the well is wet by a heavy red line we just go out and blow the well, and try to clear it up; we don't ask anybody about it; we just go and do it. We make no report to the Commission about it.
* * *

"Q. In your opinion, what is the cause of the presence of water in these gas wells in the Panhandle field?

"A. Well, I don't know for sure; all I know is that they are making water and they didn't make it before we had the heavy withdrawals in those areas.

"Q. Then, in your opinion, there is a distinct relationship between the amount and concentration of withdrawals and the presence of water?

"A. The evidence points that way.

"Q. Now, in your opinion, is there a hydrostatic head, a hydrostatic drive in the Panhandle field?

"A. I heard the testimony and the fine distinction that is drawn between those two words. All I know is that the Panhandle structure today is producing and has produced for the last number of years an enormous quantity of salt water each day. It must be coming from some place. It is coming out on top of the ground; I know that.

"Q. Now, as a practical producer, can you tell this Court whether or not that salt water constitutes a threat in the Panhandle field?

"A. It does to us in our gas production because we have lost approximately one-half of the open flow capacity of the wells that are showing water." (R. 315-317).

His general conclusion was as follows:

"I think that if conditions remain as they now are, with unregulated withdrawals over much of the structure, which is resulting in localized low pressure areas, that the water will get worse." (R. 318).

Even though the water problem in the production of gas in the Panhandle field had not developed into the serious problem it now constitutes, these appellants submit that the Railroad Commission is not under the statutes directed to await the disastrous consequences which follow from concentrated withdrawals in the field, but is armed with the power to promulgate orders, rules and regulations to prevent waste when such waste is imminent though not actual at the present time. When gas wells located in good producing

areas of the field, which have been completed in an efficient manner, 150 feet above the original water table, are now producing large amounts of water and the producing abilities of wells connected to pipe line companies have been reduced by fifty per cent of their original productive capacities it cannot be said that no water problem exists in the Panhandle gas field. The presence and production of thousands of barrels of salt water in this field from gas and oil wells cannot be theorized away by a quibble over the difference between an active and inactive hydraulic drive. The Railroad Commission was authorized to adopt all the means that it may have found necessary and proper to avert this presence or imminence of waste by reason of the water situation.

Appellants' witness Griffin corroborated the testimony of the witness Cottingham. (359). In any event the record certainly presents a conflict of testimony on the question of whether the water drive in the Panhandle field is active or inactive, and whether an orderly and ratable development and production plan in the Panhandle field has a reasonable relation to the prevention of the present and future problems of substantial waste brought about by water encroachment, coning and entrapment in contrast with the present haphazard, unratable and concentrated production methods. The conclusion reached by the Commission that its orders would tend to reduce this problem is the same conclusion that has been reached by numerous experts and practical operators in the field. To say the least, it is within the realm of reasonable debate.

4. **The ratable production features of the law and orders will result in a greater ultimate recovery of gas from the reservoir.**

As we have pointed out, the Railroad Commission is armed with authority to make and enforce rules and orders for the conservation of natural gas to prevent the waste thereof by House Bill No. 266, and that among the acts denounced by such statute as waste are underground waste or loss however caused and whether or not defined in other subdivisions thereof, and physical waste or loss incident to and resulting from so operating well or wells as to reduce or tend to reduce the ultimate recovery of gas from any pool. (Subdivisions (c) and (f) of Section 3). The appellees do not attack these provisions of the statute or the authority granted to the Commission thereby.

The record shows that 180 of the 473 sweet gas wells in the West Panhandle field do not have an outlet for light and fuel purposes; and that 121 of the 322 sweet gas wells in the East Panhandle field are in the same situation. (R. 187, 176). Since the trial court has found that the practical effect of House Bill No. 266 is to restrict the use of sweet gas to light and fuel purposes, and that appellees and those similarly situated constitute the only outlet for sweet gas for these purposes (R. 187, 188), it necessarily follows that 180 sweet gas wells in the West Panhandle field and 121 sweet gas wells in the East Panhandle field will not be able to produce unless the ratable production features of the law are sustained. This is true because appellees and those similarly situated, who control the only outlet for sweet gas for lawful purposes, will continue in the future as they have in the past to

produce as much gas as the market will absorb from their own wells.

The question arises, therefore, whether substantially more gas will ultimately be recovered from the sweet gas reservoir if a system be set up whereby all of the sweet gas which is produced down to the abandonment point of the reservoir is produced from all the 795 sweet gas wells, rather than solely from the 494 wells of the pipe line producers. If substantially more sweet gas will ultimately be recovered under the first system, it is clear that the distribution of the allowable production among all the sweet gas wells in the field has a direct and reasonable relation to the prevention of waste; and the ratable production features of the law and the orders must be sustained.

Appellants' principal witness on this point was J. H. Dunn, Chief Production Engineer for Lone Star Gas Company. The following is quoted from his testimony.

> "In any gas reservoir the resistance to the flow of gas offered by the sand or formation containing the gas prevents 100 per cent recovery. I think we are all in agreement on that, particularly as illustrated by earlier witnesses who have testified that they thought the abandonment pressure would be 25 ponds. I do not disagree with them. Twenty-five pounds in their estimate indicates that they believe that the sand resistance will prevent them from recovering all of the gas. In the absence of this resistance you could produce all of the gas out of the reservoir in the same manner that you would drain a balloon with one puncture. The resistance in the reservoir, it may be said, is the combined effect of such factors as the

size of the pore spaces and the shape of the sand grains or particles around which the gas must travel and as well the distance of travel through the reservoir. Gas flows through the reservoir or formation only when there is an expansion of the gas from a higher to a lower pressure, the rate of flow being the function of the distance of travel, the frictional resistance in the sand and the energy available from the expansion of the gas. The rate of flow will increase as the distance of travel decreases, or vice versa. We refer to the ease with which gas flows through the formation as the permeability of the formation. If the permeability is high, there is less resistance; if the permeability is low, there is a greater resistance. The expansion of the gas supplies the propellant or the motivating force to move the gas in the reservoir against this resistance. The way we make that energy available is to lower the working pressure at the well under operating conditions or during production to some pressure lower than the pressure in the reservoir, and, of course, it follows that as the reservoir pressure declines and the field becomes depleted that there is less energy available from expansion in order to move the gas. It may be said that the flow of gas through a reservoir is caused by the physical characteristics of the gas which causes it to seek a common pressure level, or equalization through expansion, which is retarded by the frictional resistance of the sand When we speak of the rate of flow, we inject the time factor which must have serious consideration when determining its effect upon the ultimate recovery of gas. It is the rate of flow, involving the time, which determines the abandonment point of a well and eventually the entire field. It goes without saying that when the rate of flow declines to the point where the continued operation

of a well is not justified then that well is abandoned." (R. 334-335).

There is no dispute in the record as to these fundamentals of gas production. The witnesses for both sides are likewise in agreement that from a practical standpoint the reservoir will be abandoned and no more gas will be produced therefrom at some point prior to the time the pressure, and therefore the gas, in the reservoir is exhausted. Appellees' witnesses placed the abandonment pressure at 25 pounds. (R. 277, 281,293). The exact abandonment pressure is not important to the point under discussion. It is important, however, that it be kept clearly in mind that it is not commercially possible to recover *all* the gas in the reservoir, and that it is necessary to set up a system of production which will result in the greatest possible recovery of gas. A system of ratable production which restricts the total production in the field to market demand and distributes the allowable production among all wells in the field is that system.

Gas flows through the reservoir or formation only where there is an expansion of gas from a higher to a lower pressure. It is the expansion of the gas which furnishes the energy which causes the gas to move in the reservoir at all. And when gas is produced from a well, it is because the pressure at the bottom of the well bore has been reduced so that it is lower than the pressure in the reservoir. There must be a pressure differential, or gas will not expand, and thus cannot flow. Thus it is undisputed that from every producing gas well there is a pressure gradient, which gradient progressively *increases* away from the well bore. It is

likewise undisputed that these pressure gradients will continue to exist up to the abandonment point of each producing gas well in the field. The angle of the pressure gradient running from each producing well will depend largely on the rate at which the gas is produced (R. 342-343, explaining Figures 13 and 14 to Original Exhibit 70), but the existence of a pressure differential, and thus of a pressure gradient, is necessary to the production of gas.

No one will dispute that the pressure gradients which exist at the abandonment of a well represent the pressure which has not been depleted by the operation of the well, and thus represent gas which the well did not recover from the reservoir. (R. 336). It necessarily follows that the greater the number of wells which are permitted to produce from the reservoir, the flatter the pressure gradients, and the greater the ultimate recovery of gas.

The witness Dunn's testimony on the point appears in the record (pp. 334-357) and is summarized in a booklet, Original Exhibit 70, which has been filed with the Clerk of this Court, which exhibit contains illustrations and graphs. The following figure (Figure No. 4 in original Exhibit 70, explained at R. 337) illustrates the point:

Figure No. 4, Original Exhibit No. 70

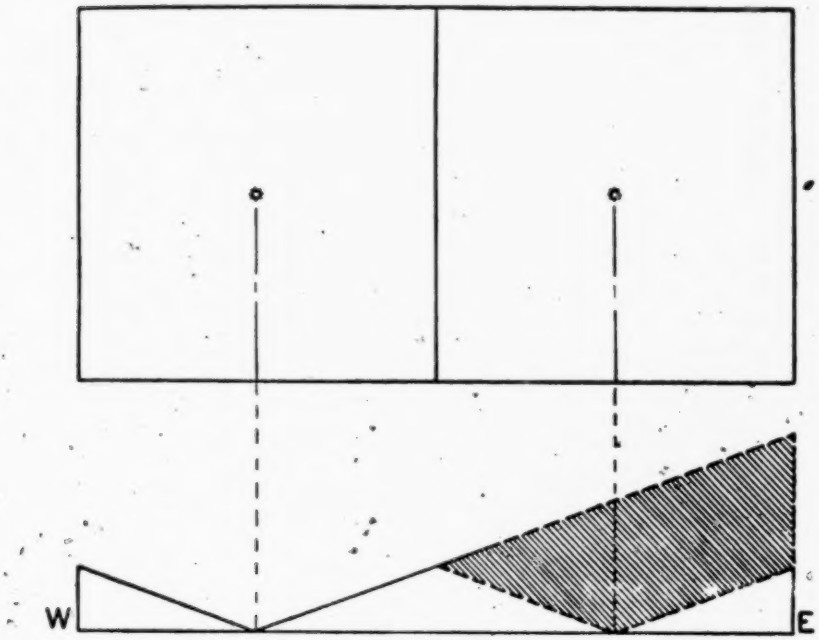

Illustration showing effect on ultimate recovery of gas from a field when one or more wells are produced to the exclusion or others.

The squares in the above illustration can represent either a gas field or adjoining sections of land, the principle is the same. Let us assume that the squares represent adjoining sections. Then let us first assume that only the well on the west section is drilled or produced during the life of the field. At the abandonment of the field and the well the abandonment pressure at the bottom of the well will be lower than the pressure out in the reservoir; otherwise, no gas would have been produced from the well. Thus there is a pressure gradient running out from the botton of the well, the pressures increasing with the distance from

the well. This pressure gradient is represented on the illustration by the diagonal lines leading from the bottom of the west well, and running at an angle from the horizontal line which represents the abandonment pressure of the well. In so far as the operation of the well has reduced the pressure in the reservoir from its original or virgin pressure down to the pressures represented by the pressure gradient, it has produced gas. It has produced the same ratio of the total gas under the two sections as the average pressures remaining at the abandonment point bear to the original or virgin pressure. (R. 324).

But, and this is the important point, it has failed to reduce the pressures which are below the line representing the pressure gradient at the abandonment of the well, and it has not been able to produce that amount of gas which those pressures represent. That amount of gas is unrecovered when the field and well are abandoned, and this represents waste of the plainest kind.

Let us assume, however, that a second well is drilled and operated, being located on the east section. Its pressure gradients will intersect those of the west well, and its operation will reduce the average of the pressure left undepleted at the abandonment point; and to the extend of the reduction will result in a greater recovery of gas. The shaded portions of the illustration show the rock pressure which has been reduced by the operation of the second well, and which, but for its operation, would have been still in the reservoir when the field was abandoned. Undepleted pressure represents unrecovered gas.

There is no dispute in the record on this point. An illustration similar to the one which has just been discussed was used in the cross-examination of appellees' witness, Gill, in the trial court. He testified:

> "You are correct in saying that when the well you have drawn on the board has reached 25 pounds of pressure at which the well will be abandoned, there will be a pressure gradient going out from that well at an angle from the bottom of the well. It is true also that, whatever the gradient is, the gas below the point represented by the gradient line leading out from the bottom of the well is unrecovered at the time the 25 pound abandonment point is reached. If at the time the first well started producing you had another well which was completed and producing at the same time and down to the 25 pound limit of abandonment, then it also would have a pressure gradient going out from it similar to the first well which would be represented by lines drawn on the bottom. *By the production from the second well which you have drawn you would have recovered gas which is above the intersection of the pressure gradients from the 2 wells, which was unrecovered by the production from the first well, up to that time.*" (R. 293, italics ours).

The question arises whether a substantial amount of gas will be lost through production from some wells to the exclusion of others. The witness Dunn testified that an appreciable amount of otherwise recoverable gas would be left in the reservoir at the abandonment point if only part of the wells now drilled are operated. (R. 342-343). As an illustration, he testified:

> "* * * any plan of development which will

tend to bring about before abandonment a more uniform development and any ratable production basis which will tend to bring about in the end a more uniform abandonment pressure will insure a greater production of gas.

"It is not difficult to prove that the above statement is true. Considering Wheeler County as a typical illustration let us assume that there will not be any additional wells drilled and that we must depend upon the present wells to produce all of the gas that will ever be recovered in this section of the Panhandle field and that unratable production continues in the future as it has in the past. Then in that event we must expect similar pressure differentials to exist in the reservoir at abandonment as are shown to exist at this time.

"Referring to the pressure differentials that are indicated to exist across Section 28, 13, and 8 in Block 24 (Figure No. 15) we find that as of this time the pressure differential in three miles is 65 pounds. Such a pressure condition is graphically illustrated in connection with this exhibit by Figure No. 16. It may be seen from this graph that the two wells in Section 28 cannot as efficiently drain the gas from underneath Sections 13 and 8 as they can that under Section 28, upon which they are located.

"It is my calculation that under conditions of this kind about 600,000 M cubic feet more gas would be lost under Section 13 than would be left in the ground under Section 28. Under these same conditions about 900,000 M cubic feet more gas would be lost under Section 8 than would be left under Section 28 at abandonment.

"In the event this condition is allowed to pre-

vail and if the wells in Section 28 will be abandoned when the reservoir pressure at those wells is lowered for illustration to 5 pounds gauge, then we may expect to produce 94% of the total original gas content from under Section 28, 88% from under Section 13, 85% from under Section 8. *In other words, the wells in Section 28 may drain Section 13 of 88% and Section 8 of 85% of the original gas content but when those points are reached and the wells are abandoned the rest of the gas will be lost.*

"If wells are drilled in Sections 13 and 8 but are not permitted to produce gas the loss of gas will be the same as though the wells were never drilled. However, if wells are drilled and produced ratably we may expect to recover an additional quantity of gas comparable to 600,000 M cubic feet from Section 13 and 900,000 M cubic feet from Section 8.

"The above example is drawn to illustrate conditions that will prevail anywhere in the field, where concentrated withdrawals of gas is practiced. The quantities of gas lost will vary with the reservoir conditions." (Exhibit 70, pp. 9-10) Similar testimony appears in the printed record. (R. 341).

The pressure differential of 65 pounds in three miles, mentioned by Mr. Dunn, is by no means an unusual condition in the field. Each part of the field has a similar condition. For example, Figures 6 to 12 of Original Exhibit 70 (several copies of which have been filed in this Court) show parts of Gray County where there is a pressure differential of 99 pounds in a mile, parts of Moore County where there is a pressure differential of 30 pounds in a mile, parts of Carson County where there is a pressure differential of 116

pounds in a mile, parts of Potter County where there is a pressure differential of 58 pounds in a mile, and parts of Hutchinson County where there is a pressure differential of 59 pounds in a mile.

Thus it may be seen that these sharp pressure differentials exist in all the counties in the field. They have been brought about by concentrated and unequal withdrawals from the reservoir. If such sharp pressure differentials are permitted to continue down to the abandonment of the reservoir, it is inevitable that large quantities of gas will not be recovered which could have been recovered under a different and saner scheme of operations.

Uniform well spacing throughout the reservoir will result in a greater ultimate recovery of gas. But the drilling of future wells is a matter in the realm of speculation and to a large extent beyond state control; and even if other wells are drilled, no beneficial results in the way of insuring a greater recovery of gas can ensue unless they are permitted to produce.

But ratable production alone, distributed among all the wells now in the field, will insure a greater ultimate recovery of gas from the reservoir.

Mr. Dunn testified:

> "Now, then, Mr. Dunn, tell the Court whether or not there would be a substantial amount more of gas recovered from the field in the Panhandle by the production of all of the wells up there or by just the production of a substantial number of them owned by the pipe lines?

"A. It is my opinion, based on these calculations in this study, that there would be a very substantial quantity of gas more recovered by the operation and production of gas—the operation of all the wells and production of gas therefrom." R. 341-342).

"Assuming that the stripping operations in Wheeler County are stopped, there will be, I estimate, approximately 60 wells without pipe line markets or without any connection whatsoever in that county. Regardless of what has transpired in the past, the production from these wells, the drainage that has existed, there would be, in my opinion, a greater production of gas and a substantial recovery of a great amount of gas in Wheeler County by production from those wells in a fairly uniform manner, than there would be if those wells, which have no connections, were closed in." (R. 345).

Appellees' witness, Boatwright, testified:

"As a practical matter, if we are taking the gas from this reservoir by a concentration of wells in the center part of the field, when the gas pressure in and around these wells became so low that you might probably abandon those wells, which is what you naturally expect would result, you would lose a large quantity of gas which you would otherwise recover by drilling about over the field generally." (R. 281).

"Question by Presiding Judge Hutcheson:

"I meant to say that when you drill more wells, drill them more thickly, that you get more cubic feet of gas out of the reservoir. We would recover more gas through a closer spacing and economical drilling * * * ." (R. 282).

Thus it may be seen that the witnesses on both sides are in agreement that, *from a practical standpoint*, more gas will have been recovered from the reservoir at its abandonment point if the gas is produced from the greatest possible number of wells. Yet unless the ratable production features of House Bill No. 266 are valid, 180 of the 473 sweet gas wells in the West Texas Panhandle field and 121 of the 322 sweet gas wells in the East Panhandle field will not in the future produce any gas, because appellees and those similarly situated control the only outlet for sweet gas under the law. In the light of this record, can it be doubted that shutting down more than one-third of the sweet gas wells in the Panhandle field will seriously reduce the amount of gas recovered from this reservoir at its abandonment?

It is true that, purely from a theoretical standpoint, one well or a small group of wells will in millions of years produce as much gas as would be produced from a large number of wells spaced uniformly throughout the reservoir. But this is true *only theoretically*, because while a few cubic feet of gas will continue to be produced from a well as long as there is a difference in pressure, as a practical matter, a gas well is abandoned when it becomes uneconomical to operate it further, and the same thing is true of an entire gas field. That appellees' witnesses recognize this as true is shown by the fact that they have said the field will be abandoned when its average rock pressure is 25 pounds. (R. 277, 281, 293). Their witness Boatwright testified:

"Theoretically, one well would drain the com-

plete field, but in doing so the time element would become of major importance. In other words, we would have to wait so long for it—come out, it probably would not be commercially profitable to do so. Now, to offset that, the ideal situation would be to drill the field completely up on every square foot. That would not be economical either because of the cost of the wells and the equipment. The economist has to work between those two limits. I did not intend to say that the ultimate recovery of gas would be just the same as far as utilization goes whether that gas comes out through one or through a million wells. If we have one well in that field, theoretically, if we could take eons of time and whatever time is necessary, we could drain all the gas out of that field down to any pre-determined pressure. Ordinarily, most gas companies figure the gas in the pool down to 25 pounds. If we use that and drill one gas well in that field, if we don't take time into consideration we could produce every bit of gas from that field down to that limit without losing any of the B.T.U. units of energy in it. However, due to the fact that it would not be economical for us to do that, it would probably result in us not waiting to get it out and would result in the abandonment of the well and leaving some B.T.U.'s in there, due to the fact that we couldn't take the time to get it out. Economically we would have to drill more wells to get the gas out." (R. 280-281).

We are here dealing *with the practical, normal operation of a gas field, not with theoretical result in comparative recovery between one well and* 800 *wells if unlimited time be given for drainage.* What boots if one well through producing a thousand cubic feet of

gas a day will in eight billion years drain the sweet gas reservoir? No one would produce one well for such a time.

Appellee's witnesses qualified their testimony by the statement: "disregarding the element of time." The element of time of course, cannot be disregarded because it plays a fundamental part in the practical operation of any gas field.

We insist there is nothing in this record which justified the trial court in rejecting our contention in this regard. Any sytem which will permit the operation of *all* the gas wells in the Panhandle field will result in a substantially greater recovery of gas up to the abandonment of the field. Since the orders provide for ratable production, and since ratable production will result in a greater ultimate recovery of gas, there can be no question that the trial court refused to give credit to undisputed testimony when it held that the orders had no reasonable relation to the prevention of waste.

Again we insist that the findings of the Commission based upon the evidence not only of the witnesses produced by the appellants, but upon the testimony of appellees themselves, must be sustained, and that an examination of the testimony will reveal that there is no dispute on the issue as to the proposition that ratable production will bring about a greater recovery of gas from the Panhandle reservoir. Certainly if practical operators in the field themselves are putting ratable production in operation and making it the basis for the investment of large sums of money, it cannot be said that the conclusion reached by the Com-

mission is one that no reasonable man could have reached from the evidence.

5. The drainage areas fixed by the orders are reasonable.

The trial court held that on the view it took of the case the contentions of appellees as to unreasonableness of the formulas are unimportant. However, in view of this court's holding in the case of *United States v. American Railway Co.*, 265 U. S. 425, 68 L. ed. 1087, 44 S. Ct. 560, we deem it necessary to discuss in this brief such formulas and bases.

House Bill No. 266 directs the Commission to take into account, in determining the daily allowable production for each gas well, acreage and potential, provided that the Commission shall not take into account any acreage in excess of the efficient drainage area of such well or wells producing at 25% of the daily productive capacity, which drainage area shall be determined by the Commission. That in determining such drainage area, the Commission shall take into account (1) factors which are reflected in the productive capacity of the gas well, including formation pressure, permeability and porosity of the producing formation and the well bore's structural position, together with (2) all other factors taken into account by a reasonably prudent operator in determining the drainage area for a gas well. The Commission in formulating the order of December 10, 1935, heard full testi-

mony and its findings with respect to such formula are full.[1] (R. 489-490).

The complaint of appellee Texoma is that "section (f) of the order dated September 25, 1935, purporting to fix the efficient drainage area of wells located in the West Panhandle field under present conditions at 640 acres are manifestly unreasonable, arbitary and confiscatory" because "complainant has many leases located within the known limits of said reservoir * * * which contain more than 640 acres." (R. 101). Texoma's real complaint is that the statute and orders give no consideration to undrilled acreage. (R. 101-104).

Appellee Consolidated Corporation's real complaint is not that the 160 acre drainage area fixed for the East Panhandle is improper but that probable but undeveloped gas acreage is not considered by the statute. (R. 39). It will be noted that the alleged probable gas acreage of this company is non-contiguous to its

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[1]The Commission found in effect that the evidence at the hearings did not satisfy the Commission that wells located in the West Panhandle field have an efficient drainage area substantially different from those located in the East Panhandle field (160 acres). That "on account of the lack of diverse fee and lease ownership in said West Panhandle Field and the widely spaced drilling program which has been followed in said field, it is equitable to fix an acreage factor * * * in the West Panhandle Field substantially larger than that which is fixed for the East Panhandle Field * * * that no substantial inequities or injustices * * * will be occasioned" thereby. The drainage area in the West Panhandle Field was fixed at 640 acres. (R. 488).

producing acreage.[1] It has twelve wells on 1470 acres, an acreage of less than 123 acres per well, and a 160 acre unit is more beneficial to it than would be a larger unit. Obviously it could have no complaint that the 160 acre unit is too small.

It may be true that one well if given an unlimited time will drain some gas from an area in excess of 640 acres, but the statute directs the Commission to fix an *efficient* drainage area. In this respect the evidence adduced by the appellees falls short of establishing any fact showing or tending to show that the 640 acre drainage area prescribed for the West Panhandle field is not an efficient one. Appellees' only witness on this point who stated the bare conclusion "that a well will drain efficiently a tract of more than 640 acres in the West Panhandle field", (R. 251), admitted that he knew nothing about the factors to be considered and that he did not know what would be a reasonably efficient drainage area. (R. 253). In addition, appellees may cite instances where one well affected by drainage some territory in excess of a 640 acre tract. These instances prove nothing as far as the issue of efficient drainage area is concerned, since all concede that a single well in the field given eons of time will ultimately affect the entire field.

Texoma has 198.200 sweet gas acres in the field and 89 producing wells. Its drilling program calls for 150 additional wells (R. 209) which, with the 89 wells

[1]Its undeveloped acreage in Collingsworth County (in which county there are no commercial wells producing) is about twelve miles from developed acreage. R. 246.

already producing, will give it 239 wells on 198,200 acres, or approximately one well per 830 acres, a drilling pattern which is not far from the 640 acre drainage area fixed by the Commission's order. There is no evidence in the Record contradicting the Commission's finding to the effect that the conditions as to the permeability or porosity do not differ as between the East and West Panhandle field, or that a substantially different drainage area should be applied to them. However, on account of the lack of diversity of fee and lease ownerships in the West field and the widely spaced drilling program already developed there, it is equitable that a larger acreage factor should be applied to that field, and the Commission so found. (R. 488). Manifestly some consideration must be given to the conditions actually existing in the field. Engineers could probably debate for years as to what constituted a reasonable drainage area in the Panhandle and other fields in Texas.[1]

But this does not render the findings of the Commission on such conflicting testimony unreasonable. There are tremendous areas in the West field undeveloped; 81% of the East field is without wells. To

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[1]A three-judge court said with reference to the difference of opinion existing between experts on oil and gas: (**Amazon Petroleum Corporation v. Railroad Commission**, 5 Fed. Supp. 638).

"We have examined with the greatest care this mass of evidence, voluminous, ponderable, pretending to scientific accuracy, as to physical conditions in East Texas, and the relation of the restrictions to the prevention of waste there. We are impressed, but not aided, by the fact that scientific men of standing, integrity, and ability can so radically disagree."

attempt to allocate to the owners of such properties allowables based on what might be under such properties would be the sheerest conjecture. It would be manifestly absurd to allocate gas production to areas that do not have producing gas wells, however large such areas may be. Porosity and permeability of the field differ widely. The owners of areas in the center of the field may find the underlying formations pinched by a great granite ridge, which geologists agree lies under this area and consequently have a reduced production. Wells drilled within close proximity of each other have widely varying potentials, indicating widely varying differences in the porosity and permeability of the producing horizon. Such potentials are indicative of the producing ability of only a relatively small area adjacent to the well.' It would be grossly unfair to assign to an area of relatively large size a gas content evidenced by the producing capacity of only one well.[1]

While theoretically, if practical considerations were ignored, one well would ultimately drain the entire

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[1]The possibility of ascertaining approximately the potential production of a proved oil field, and particularly the East Texas Oil field which is referred to in the case of **Brown v. Humble Oil & Refining Company**, supra, is not applicable here. The latest oil spacing rule in Texas is 10 acres, which applies to the East Texas field. Many of the 21,000 oil wells in East Texas were drilled under a prior two acre rule. Over 60% of the East Texas wells were drilled under exceptions to the spacing rule with the result that there is a density in that field of less than one well to 6.5 acres. The East Texas Oil field has been "tested and developed" to the point where an approximate determination can be made of the amount of the oil in place. Not so in the Panhandle field in which 81% of the acreage is undeveloped.

field, given geological time, the Commission has to deal with practical operations. An ideal situation would be to drill the field up completely upon each square foot, but economic considerations require that some point between the two limits be found.[1]

How fares Texoma under a formula providing for a 640 acre drainage unit for the West Field? Under such formula it is actually allotted one million cubic feet of gas per day more than it would be allotted were the drainage area fixed at four times this amount, or 2560 acres.[2] Obviously, since Texoma is benefitted by the smaller unit it could have no objection that a larger unit was not adopted.

It is undisputed in the record that from a practical standpoint closer spacing and the operation of the greatest possible number of wells will result in a greater ultimate recovery of gas from the reservoir. The witness Dunn showed that under conditions actually existing in the field the operation of two wells on one section will, when the wells are abandoned, have failed to recover 1,500,000,000 cubic feet of gas under two adjoining sections, which would have been recovered if wells had been operated on the adjoining sections. (R. 342-343). Thus it is obvious that the operation of a well results in much more effective drainage of the area immediately surrounding the well bore, and

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[1]Testimony of appellees' witness Boatright, (R. 280).

[2]Under the order of December 18, 1935, using the present 50/50 potential factor on a 640 acre drainage basis, Texoma is allowed 136, 133 M.C.F. daily; on a 2560 acre drainage basis its allowable would be 135,596 M.C.F. daily. (Exhibit 47, R. 544).

the section on which it is located than of adjoining lands. And it must be remembered that it is made the duty of the Commission to fix the *efficient* drainage area or the area which a well will drain most effectively. Under this, if practical considerations be ignored, the Commission would have been entirely justified in fixing the drainage area at 10 acres since it is clear that, since pressure gradients increase progressively from the well bore, a well will at its abandonment have reduced the pressure more and thus drained of gas more effectively the area immediately surrounding the well. Economic considerations, the fact that practical operators do not develop gas fields on such a basis, must have some weight. But the fact remains that the line had to be drawn at some reasonable point by the Commission. Certainly the record is so barren of any testimony tending to show that the Commission's action was arbitrary, that we are justified in saying that appellees practically abandoned the point.

The factors which the Commission must consider are factors which are reflected by the potentials of a gas well and all other factors which a reasonable prudent operator would consider in determining the drainage of a gas well. In large sections of the field practical operators have developed their property on substantially one well to 640 acres.. The Commission was charged with the duty of fixing units which would secure the recovery of the greatest ultimate amount of gas, units which would not lead to high concentrated areas of withdrawals, and which would not create undue water hazards in the way of channeling and coning; units which would recognize local variations in porosity and permeability.

To permit the continuance of the present evils, withdrawals from small concentrated areas under the guise of producing the gas content that is presumed to be under non-contiguous undeveloped acreage, would mean a continuance of the present ununiform development in the field and the loss of billions of cubic feet of gas that would remain unrecoverable in the reservoir. In the *Champlin* case the complainant urged that the action in question and the orders promulgated pursuant thereto did not provide for fair and equitable proportionate taking by operators in the common field. In the dissenting opinion of the lower court (51 Fed. (2d) 834) it is asserted that failure of the Oklahoma law to give any recognition to acreage constituted a fundamental defect in the law and order referred to. The dissenting opinion pointed out that the Oklahoma statute there involved only considered in the allocation of allowable a single factor of productivity or potential capacity and stated: "Acreage is ignored and an operator with two 5000 barrel wells on five acres may take out a common pool of supply under the provisions of section 4 as much oil as an operator with two 5000 barrel wells on 20 acres in the same field. Proportionate taking per well is wholly inequitable if the Legislature intends to secure a just distribution to areas from the enjoyment * * * of their privilege to reduce to possession because the operator with 20 acres has four times as much privilege as the operator with five acres in the same field."

It will be noted that the formula adopted in the *Champlin* case was based solely on potential capacity

and no credit whatsoever was given to acreage, while the formula here under consideration, as directed by the statute, gives credit to both potential and acreage, allotting to each factor fifty per cent of the total allowable.

It must be remembered in connection with the contention of the appellees that the areas of the most concentration in the Panhandle field present the worse water situation (R. 305), and that in order to get the maximum benefit of the high pressures that remain in the West Panhandle field numerous wells must be drilled throughout the area, or gas must be produced out of all of the wells already in the area, and if the field were thoroughly drilled up it would produce more than if it were partially drilled (R. 341); that if the Texas Panhandle Gas Company (Consolidated Gas Utilities Corporation) and others continue to produce large quantities of gas from a few wells to the exclusion of others, their operations will continue to contribute towards large pressure differentials in the reservoir. The continuance of such operations will discourage the drilling of additional wells and to a very great extent will prevent more uniform and complete development of the field.

The result therefrom would be the loss of large quantities of gas in the reservoir that can never be produced, which loss is just as real as if the gas were blown into the air and wasted. Lack of development means loss of gas. The pressure differentials now existing in the reservoir are not so serious from the standpoint of total recovery, if this condition is rectified before the abandonment of the field. The way to rectify such condition is to drill such additional wells as are

drilled as uniformly and closely as economically possible and put into practice ratable production. Ratable production alone will bring about a greater recovery of gas. Uniform well spacing alone will provide the means for a greater recovery. However, both ratable production and uniform well spacing will result in the greatest practical recovery of gas. (p. 13, 14, Original Exhibit No. 70).

In the light of the testimony, can it be said that the action of the Railroad Commission is so arbitrary and unreasonable as to be beyond the realm of debate?

6. The formula allotting fifty per cent of allowable to productive capacity and fifty per cent to acreage is reasonable.

The complaint of appellee, Consolidated Gas Utilities Corporation, as to the formula is in general terms and is in reality a complaint that no consideration is given to its undeveloped, non-contiguous acreage. (R. 39). The complainant of appellee, Texoma Natural Gas Company, is that under the fifty-fifty formula drainage of large quantities of gas will occur from its leases, because many of its wells are located on tracts of land larger than 640 acres, and that many wells belonging to others in the vicinity of these leases are located on smaller tracts ranging from 320 to 20 acres; that the basis of allocation will permit the owners of wells in such adjacent small tracts "to produce more than fifty per cent as much gas" from such tracts as may Texoma from larger tracts ranging from 640 to 2000 acres. That drainage will ultimately result to such smaller tracts and be lost to Texoma, thereby taking its property without due process. (R. 104, 105).

There is nothing in the order that would prevent

Texoma from offsetting such wells on smaller tracts and by developing its own property to the same density as such adjacent tracts remove any advantage accruing to such smaller tracts by application of the fifty-fifty formula. That right it had before the passage of House Bill No. 266. That right it still has. Spacing conditions now existing were already existing at the time complainants commenced their operations in the field.

Complainants content themselves with criticism of the formula adopted by the Commission. They do not show or attempt to show that a formula allotting a greater percentage to acreage and less to potentials would bring about more equitable results; they rest upon the proposition that a formula that does not give them credit for undeveloped acreage in excess of the drainage area fixed by the Commission is unreasonable and arbitrary.

By their witness Carpenter complainants give specific instances where as between individual wells the allowables will work inequities. (R. 249). By their exhibit 26 complainants draw comparisons between four wells in the sour gas area and four wells in the sweet area. (R. 249). By the same witness they draw a comparison between a well with an assumed potential of 25,000,000 cubic feet and a per acre reserve of 15,000,000 cubic feet, which "are not based on any particular well". These comparisons are made to show that an allowable disproportionate to the acreage occupied by such well under such theoretical conditions; they in no manner establish that any such

conditions exist as to the situation of Texoma or that they exist generally throughout the field.

It is obvious that on this score Consolidated could have no complaint, since its producing leases are developed on the basis of less than 160 acres to a well (12 wells on 1476.83 acres. R. 246). The order gives it an advantage over other producers in the East field as a whole.

The provisions of House Bill No. 266 as to the manner and method to be followed in determining the formula to be applied are more elaborate in detail than the oil and gas proration statutes of any other states which we have examined.[1] The latter usually provide

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[1]The Arkansas gas statute provides for a factor considering the ratio of the potential of the well to total potentials in the field, having due regard to the acreage drained by each well Legal Appendix to Final Report of Federal Trade Commission to the Senate of the United States, pursuant to Senate Resolution No. 83, 70th Congress, First Session, on Economic, corporate, operating and financial phases of the natural gas producing pipe lines and utilities industries with conclusions and recommendations Document 92, Part 84-B, page 19.

The Kansas statute provides only for a consideration of well potentials to total potentials in a common source of supply. (Idem, p. 29).

The former Louisiana statute provides that the percentage of open flow capacity that gas wells shall be allowed to produce shall depend upon the acreage upon which the well is drilled. No credit is given for more than 160 acres. The minimum of seven percent of open flow capacity for wells on tracts of five acres or less. The maximum acreage allotted, 160 acres, 24% of open flow capacity, with a minimum production of one million cubic feet daily. The statute provided that in pro-

that the apportionment or allocation of allowable shall be upon the basis of the relation of the well potential to total field potential having regard for acreage. The general Texas statute relating to how the allowable of oil and gas shall be allocated only provides that such allocation shall be on a reasonable basis, (p. 34 of this brief). The test which the courts have laid down governing the action of the Commission in the proration of oil is that the field must be produced in an orderly manner, each person withdrawing the oil underlying his land, and that which can be brought to his wells by proper producing methods. *People's Producers Corp. v. Smith,* 1 Fed. Supp. 361.

In the *People's Producers'* case the court enjoined

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rating market demand the relation of well potential to total potentials in the field, having due regard to the acreage drained by each well, shall be considered. (Idem, pp. 35, 36, 37).

The new Louisiana conservation act (effective July 8, 1936) provides for distribution of oil and gas allowable "on a reasonable basis"; that due consideration shall be given to potentials as well as surface acreage and such other factors as may be pertinent.

The Mississippi statute provides for a consideration of the relation of well potentials to field potentials and authorizes the oil and gas board to prevent unfair and inequitable taking and unreasonable discrimination, with detailed provisions as to percentages of open flow capacity of gas wells depending upon the size of the tract, volume of flow and location of wells. A wide lattitude is given to the oil and gas board. (Idem, p. 41.)

The Oklahoma statute provides for consideration of the ratio of well potentials to field potentials, having due regard to acreage. (Idem, p. 52.)

the Commission's order because it apportioned the allowable on a per well basis, while the proof showed a difference of potentials between the plaintiff's wells and some of the others. See also *Amazon Petroleum Corp. v. Railroad Commission.* The East Texas oil field is prorated on the basis of the potential factor, with only a few barrels difference between the best and the poorest wells in the field. No consideration is given to acreage. Inequities may arise under such order, due to the fact that the production of a fraction of an acre may produce as much oil as may a well on a ten acre tract. These inequalities arising in individual cases, however, have not invalidated proration orders, nor shown an abuse of its discretion by the Railroad Commission when the whole situation is considered. *Amazon Petroleum Corporation v. Railroad Commission,* supra, *Brown v. Humble Oil & Ref. Co.*, 83 S. W. (2d) 925, on rehearing 87 S. W. (2d) 1069. A proration formula based on potentials and acreage, almost identical with the order in question, was upheld in *Boxrollium v. Smith,* 4 Fed. Supp. 624. Formulas wholly ignoring the acreage factor were also upheld in the *Champlin case.*[1]

The order considered in the *Superior Court of California v. Associated Oil Co.*, 294 Pac. 717 was upon an allotment of the amount of gas to which the field was limited to the several parcels of land based upon the ascertained potential oil production of each parcel. The court said: "Reading the act as a whole it cannot be said that the method of its enforcement at-

[1]The provisions of the statute are set out in full as a foot note to the opinion in the case, 286 U. S. 223.

tempted by the court was unlawful or improper."

In *Danciger O. & R. Co. v. Smith*, 4 Fed. Supp. 236, the validity of the proration order of the Railroad Commission applying to the Panhandle oil field which is a part of the same general reservoir underlying the gas field was upheld. This proration formula was based alone on potentials without regard to acreage.

If proration orders based wholly upon potentials and wholly disregarding the factor of acreage are found to be reasonable as applied to both gas and oil fields under the decisions just cited, it cannot be said that the present formula which assigns only fifty per cent of allowable to potentials and the remaining fifty per cent to the acreage factor should be stricken down as not giving sufficient consideration to such acreage factor.

No doubt there are inequalities existing under the fifty-fifty formula, but there is no suggestion that greater inequalities would not result from the adoption of another formula. As was said by the California District Court of Appeal in the *Bandini* case, 293 Pac. 899, quoted by this court in the case of *Bandini Petroleum Co. v. Superior Court*, 284 U. S. at page 18:

> "* * * because of the many and varying conditions peculiar to each reservoir and to each well, which will bear upon a determination of what is a reasonable proportion of gas to the amount of oil produced, it may be said that it would be impossible for the Legislature to frame a measure based on ratios or percentages or definite proportions which would operate without discrimination, and that what is a reasonable proportion

of gas to the amount of oil produced from each well or reservoir is a matter which may be ascertained to a fair degree of certainty in each individual case."

But in the final analysis how under the actual operation of the orders do Texoma and Consolidated Gas Utilities fare under the fifty-fifty formula? Consolidated Gas Utilities has long since exhausted all the gas originally underlying its producing acreage.[1] The evidence wholly fails to show that the allocation of allowable made to it is unreasonable either on the basis of the potentials of its wells in relation to total potentials in the field, or upon the amount of developed acreage, or considering its withdrawals as compared to its original reserves.

Nor does Texoma have real grounds for complaint. This company owns 18% of the wells in the West Panhandle field and 22.4% of the total gas allowable of the West Panhandle field is allocated to it. While it owns 26% of the sweet gas acreage in the West Panhandle field it is credited with 25.8% of all acreage in such field. With 18.7% of the total open flow in the West Panhandle field it is allotted 22.4% of the allowable, giving it an advantage of 3.7% in this respect. On a per well basis it enjoys an advantage of 4.4%. While on an acreage basis it only has a disadvantage of two-tenths of one per cent. (R. 322).

After all it must be obvious that in so far as any

[1]In some instances Consolidated Gas has taken 127,366 M.C.F. of gas per acre, or nine times the estimated average original reserve per acre. (R. 501).

consideration is given to surface acreage that a factor is taken into account which does not in any way reflect the ability of the tract to produce gas. There is no dispute in the record on the point that it is only by the drilling and operation of wells that it can be definitely determined whether or not a given tract will produce gas or its ability to produce gas, and it is the producing ability of the well which is drilled which reflects the productivity of the formation underlying any surface area. For example, appellees' Gill testified:

> "The potential is an evidence of the comparative ability of * * * formations to deliver gas to the wells." (R. 292).

Appellees' witness Carptenter testified:

> "As to whether it is true that when you take the potential of a well that that potential reflects the ability of that well to produce gas, the open flow shows the amount that will come out against atmospheric pressure. I presume that it is the most accurate guage that is known to the engineering fraternity of determining actually what is the power of the well to produce. It is the one that is used. (R. 251-252).

It is the fact that the producing ability of a well so directly reflects the ability of a tract to produce oil and gas that explains that a consideration of relative potentials is so universally used in the allocation of production among wells in most proration formulas.

The relative potentials of wells is a fact which is cap-

able of definite ascertainment, and when production is allocated to wells, whether oil or gas, on a consideration of relative potentials, the difference in the allowables allotted to the wells is based on the different producing abilities of the wells as shown by actual tests. It is true, of course, that in a common gas reservoir such as the Panhandle field, that the surface ownership of leases is somewhat indicative of the ownership of gas in place, but the mere ownership of surface acreage in nowise indicates the quantity of gas in place or the ability of a tract to produce gas. Certainly in a field such as the Panhandle gas field where the potentials of gas wells vary sharply from lease to lease, the Commission did not act arbitrarily or unreasonably in allocating one-half of the total allowable production among the wells in the field on a basis of their relative potentials, and the only complaint of appellee, Texoma Natural Gas Company, on this score is that a greater percentage of the total allowable should have been allocated solely on the basis of acreage owned regardless of the productivity of the tracts or the ability to deliver gas.

The proration formula may not be mathematically perfect; but in operation it gives substantial justice in allocating gas production. It gives weight to all the factors prescribed in the Statute. As gas is produced from a well its pressure and potential decrease.[1] By giving fifty per cent weight to acreage, the formula recognizes the probability that more gas is likely to

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[1]With lowering rock pressures there is a resulting lowering of potentials. R. 312,313.

be under a larger tract than a smaller tract, although this is not necessarily so. To allot to the acreage factor more than fifty per cent weight would be going into the realm of speculation and unduly extending an unknown factor. "What a given amount of land will produce in the way of gas is not known until you have drilled it to see."[1] In *Dayton Power & Light Company v. Public Utilities Commission*, 292 U. S. 290, 78 L. ed. 1267, 54 S. Ct. 647, in speaking of the weight to be given opinion evidence as to gas in place under land, this court said:

> "In the first place the intrinsic value of the leases is dependent upon the capacity of the lands to yield productive wells, a capacity seldom to be judged with even a fair approach to certainty until tested by experience."

These well known principles concerning the presence or amount of oil or gas under land has given rise to the expression, "that the only way to find out is by the drill."

The law requires no more than that the proration formula shall not be arbitrary or capricious, not that it shall necessarily be the wisest or that it shall accord with the opinion or judgment of every one concerned.[2]

A perfect solution of the problem, if a perfect solution exists, would involve years of engineering study, taking into consideration all of the underground fac-

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[1]Testimony of Complainants' witness Carpenter, R. 252.

[2]Pacific States Box & Basket Co. v. White, supra: "With the wisdom of the regulation we have, of course, no concern. We may inquire only whether it is arbitrary or capricious."

tors and everything else involved in the field, economics as well as engineering.[1]

Certainly appellees have no ground for complaint against the formula, when the result of its application gives them more in proportion than their wells, potentials, and acreage bear to the total wells, potentials, and acreage of the field.[2]

7. The orders in allocating allowables to the sour gas area are not invalid as against claims of alleged discrimination.

The orders of the Commission in dividing the field into sour and sweet gas area and in allotting to each area its market demand for the kind of gas produced follows the statute. The pleadings of appellees do not attack these particular provisions of House Bill No. 266 and raise no justiciable issues in this respect.

It is doubtful that Texoma would be in a position to complain of the allocation of allowables to the sour gas area since it owns acreage in excess of 11,000 acres of sour gas lands (R. 324). The appellee, Consolidated Gas Utilities Company, could have no possible complaint in this respect since there is no sour gas in the East Panhandle field to which field its operations are confined. No specific proof appears in the record that any drainage from sweet gas area to the sour gas area and to the oil fields miles away from Texoma's properties would be in appreciable amounts. Drainage throughout the field is comparatively slow. (R. 359).

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[1]Complainants' witness Boatright (R. 275).

[2]Exhibit 57.

This is evidenced by the fact that the original discovery well in the Panhandle field, the Masterson well, which was drilled in 1918, still has 418 pounds pressure, a drop of only 17 pounds from its original pressure of 435 pounds. (R. 223). It will be further noted that large portions of the sour gas area still retain a practically virgin pressure so that drainage, if any, is from and not to this high pressure sour gas area. In any event such drainage is dependent upon local production existing in the exact points of inquiry, and the length of time for drainage to be effective is not definitely known. *The Henderson Company v. Thompson et al.*, 14 Fed. Supp. 328, at 332.

The problem of pressure differentials was already in existence at the time the appellee, Texoma, entered the Panhandle field.[1] These records are shown in Exhibit 51, R. 319; practically all now existing carbon black and gasoline plants and the present physical setup had been established.

The fact that lower pressures exist in the sour gas area than exist in the sweet gas area is a result of the many years of operation in the field prior to the consideration of the problem by the 44th Legislature of Texas in 1935. The record shows clearly that there is nothing that any human agency can do at this time

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[1]Appellees' witness Hughes (R. 236) and Carpenter (R. 252). "The creation of pressure differentials in the field began back in the beginning of oil production about 1926 when withdrawals were from the oil area and not from the gas area," (appellees' witness Parker R. 259) and existed when the Legislature started to deal with the problem in the early part of 1935. (R. 257).

to correct the general conditions of pressure differentials which exist between the two areas.

In so far, however, as it is claimed that the sour gas area is currently permitted to produce a disproportionate amount of gas from the general reservoir as compared to the percentage of the total acreage for the sour gas area, a short answer is that the allowable allocated to the sour gas area is based on the amount of sour gas which the carbon black plants are able to absorb. In other words, the Railroad Commission has found the market demand for sour gas just as it has for sweet gas, and when it first undertook to carry the law into effect it allocated to the sour gas area an allowable which was in keeping with the market demand for sour gas. Texoma Natural Gas Company, through its counsel, had publicly announced, prior to the passage of House Bill No. 266, that it recognized the carbon black plant as a legitimate industry, and that it was willing for sour gas to be dedicated to carbon black uses and did not have any objection to any drainage that might be suffered by it by virtue of the operation of the carbon black plants in the sour area of the Panhandle gas field. This is shown by the testimony of S. A. L. Morgan, attorney for Texoma Natural Gas Company, before the Subcommittee of the Committee on Interstate and Foreign Commerce of the House of Representatives, as follows:

> "In this connection, I want to make this observation: The carbon black industry has been flourishing in the Panhandle, and properly so. Mr. Keffer made the observation that they are per-

> mitted to use it for carbon black. I think it has a legitimate place in production, and although we own sixty-one per cent of the entire reserve we are not complaining when they use it for carbon black, when they not only take their own, but when they are taking our gas as well, and we believe that they have taken a great deal more of our gas than we will be able to take at the same time. We think it is a legitimate industry and we are willing to submit to the drainage that is burned in carbon black plants; we are not objecting to that, merely because we are not able to protect ourselves, because they are draining it out of our reservoir. We believe that to be a legitimate taking of gas." (R. 401-402).

In any event any such alleged inequalities will tend to be alleviated by reason of the fact that demand for sweet gas for light and fuel purposes is constantly growing, while the demand for carbon black manufacture is comparatively static. *The Henderson Company v. Thompson*, supra.

If there are inequalities arising under the order appellees neither allege nor show that they have directed such inequalities to the attention of the Commission and asked for relief with respect thereto; nor do they allege that such administrative body would not give them a fair hearing on such claimed discriminations. Under Section 15 of House Bill No. 266 the Commission was authorized to lower the allowable of any well producing in excess of 15% to 15% of its daily producing capacity, if such production above 15% would cause waste due to intermingling of sweet and sour gas. By its order of January 18, 1936, the Commission so reduced the sour gas allowable to 15% of the potentials

of the wells involved. (R. 556). It has certainly not been established that the Commission would not give appellees a full or fair hearing on the question of any alleged discriminations against them. Appellees have the right to apply to the Commission to correct such alleged discriminations as a matter of right and not as a matter of grace. *Brown v. Humble & Ref. Co.*, 83 S. W. (2d) at page 944.[1] Appellees do not allege or show that they have invoked their right to seek redress before the Commission as to such discriminations of which they now complain. They assume the attitude of making no showing before the Commission of any character.[2]

Upon well settled principles this Court is bound by the construction placed upon the power of the Texas Commission by the Texas Supreme Court to give relief against asserted inequalities. *First National Bank v. Board of County Comrs.*, 264 U. S. 450, 68 L. ed. 784, 440 S. Ct. 385. In the recent case of *P. F. Peterson Co. v. Bryan*, 290 U. S. 570, 78 L. ed. 505, 54

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[1]The Texas Supreme Court said: "In this connection (discriminations arising under Rule 37) we hold that since the Legislature has bestowed the power of administering the oil and gas business of this State on the Railroad Commission, every person has the right to apply to that tribunal for relief as a matter of right and not as a matter of grace."

[2]This attitude is reflected in the testimony of Complainants' witness Gill: "I attended the hearing of the Railroad Commission on which this order was predicated. Mr. Morgan was there. I was then retained by Texoma Natural Gas Company in connection with this case. I did not testify at the hearing and Mr. Morgan did not put any witnesses on the stand at the hearing before the Commission." (R. 290).

S. Ct. 277, Mr. Justice Butler, speaking for this Court, said:

> "Moreover, the State Supreme Court held that a secondary purpose of the act is to prevent unfair competition by dishonest bakers resulting in injury to the consuming public. As there is no showing that the measure is not reasonably calculated effectively to serve for that purpose, the judgment upholding the act must be affirmed. And, in so far as it upholds the rules and regulations, it must be affirmed upon another ground. The lower court, following our decision in Red. "C" Oil Mfg. Co. v. Board of Agriculture, 222 U. S. 380, 56 L. ed 240, 32 S. Ct. 152, supra, held that *where one complains that regulations promulgated under legislative authority by a State board are unreasonable and oppressive, he should seek relief by applying to that board to modify them.* There is no suggestion that, if appellants had sought modification of the tolerances complained of, their application would not have been fairly considered or that they would have been denied relief to which they were entitled." (290 U. S. 575, Italics ours).

There is nothing in the situations of these appellees that avoids the rule as laid down by this Court in these cited cases.

The Commission offered full opportunity to all who might desire to complain of any provisions of the orders.

The order of December 10, 1935, provides:

> "It is further ordered that this docket be kept open for the introduction of further evidence or

information so that the Commission may, at any time modify or amend this order or enter such other or further general or special order or orders as may be necessary to correct or relieve any inequalities, injustices or inequities that may result from the enforcement of the provisions of this order." (R. 495).

The orders of December 18, 1935, (R. 499), and January 18, 1936, (R. 558) each contain similar provisions.

Complainants not having availed themselves of the administrative remedies available to them, cannot now challenge the validity of the provisions of the order. The fact that they assert deprivation of rights secured by the Federal Constitution does not militate against the application of this rule. *First National Bank v. Board of County Comrs.*, supra.

V.

Failure of the statute and orders to give credit for undrilled acreage does not militate against their validity.

Appellees complain because House Bill No. 266 does not provide for any consideration to be given to undrilled and undeveloped acreage in fixing the allowable production of the various gas wells in the field. The Act (Sec. 13) makes it the duty of the Commission in allocating the total allowable among the various wells to take into account (1) the relative producing capacity of the wells and (2) the size of the tracts upon which the wells are located, provided that the Commission shall not take into account the size of the tract upon which any gas wells are located in excess

of the efficient drainage area of such wells, which drainage area shall be determined by the Commission.

Many oil proration orders have been sustained which divide the field allowable among the various wells in the field on a basis of relative potentials, with no consideration being given to the difference in the size of the tracts on which the wells are located. But certainly if the size of the tract upon which a well is located is to be a factor in allocating the allowable production it cannot be reasonably contended that undrilled, undeveloped and unimproved acreage should be taken into account. After all House Bill No. 266 is a mere production regulation. It provides for the restriction of total production of all gas wells to the market demand for such gas, and then provides for the distribution of the total allowable among wells not tracts. It is through the drilling and operation of wells and only through wells that gas may be produced from the reservoir or that the productivity of any tract or area may be determined. This is a fact which would be within the judicial cognigance of this Court if the record were silent on it. However, appellees' witness, Carpenter, testified:

> "It is also true that you cannot know exactly what a given amount of land will produce in the way of gas until you have drilled it to see. You cannot tell in advance of drilling whether it will produce at all or not." (R. 252).

81% of the East Panhandle gas field is undeveloped. (R. 352). How much of the total daily allowable production for that field would appellees have the Legislature allocate to "A" who owns 200 acres in the field

but who has drilled no well thereon. How much additional allowable should be allocated to appellee, Consolidated Gas Utilities Corporation, because of its 1500 acres in Collingsworth County in which County not a single gas well is producing. (R. 245).

It must be obvious that if undrilled acreage is to be considered, an owner of entirely undrilled acreage must receive the same benefit that an operator who has both developed and undeveloped leases receives for his undeveloped acreage. Fixing an allowable for an owner of an undrilled lease would be simply a gesture because without a well he could not produce his gas, if in fact his lease contain gas which in itself is entirely speculative in the absence of a well.

The statute adjusts only the rights of producers. Obviously a tract is not under production beyond the point that a well will drain it; and thus it was entirely reasonable for the Legislature to provide for taking acreage into account only up to the efficient drainage area of a well on the tract involved.

It is true, however, that the owner of undrilled acreage receives many benefits from the operation of the law. First, the restriction of sweet gas to light and fuel uses greatly reduces the total withdrawals from the reservoir. Second, the ratable production system provided for will prevent the creation of low pressure areas, and thus minimize drainage. Third, a system has been set up which should insure to him an opportunity to produce gas from his lease if he drills a producing gas well thereon. Fourth, he is authorized to enter into pooling agreements with other owners of

leases so that all may participate in the benefits of a cooperative development of their properties. (Sec. 21).

In view of the fact that the statute is simply a production regulation, the contention of appellees is farfetched. After all the Legislature is the judge of the means which should be adopted to adjust or cure the conditions which have existed in the gas fields of the state, and if the means adopted have a reasonable relation to the accomplishment of the desired end, the court is not required to puzzle itself as to whether some other means would have accomplished the same result as well or better.

It may well be argued that in so far as any consideration is given to acreage that consideration is given to undrilled acreage, since the well bore penetrates only a few inches of the producing sand. Where a well is drilled it seems entirely equitable for consideration to be given on account of the ownership of the area which the well will efficiently drain. But to say that an operator who has one well on 50,000 acres should be given the same allowable as an operator who has 100 wells on 50,000 acres is carrying the point to an absurdity.

What we have said in our discussion of the drainage areas (pp. 213-222 of this Brief) and the fifty-fifty formula are equally applicable to this argument.

CONCLUSION

Appellants submit that the claimed violations of the constitutional rights of appellees have not been sus-

tained. That the Act and orders constitute a valid exercise of the police power of the State of Texas, the real party at interest, representing an effort by the State to settle permanently and in a comprehensive manner the complex and diverse problems of the more than one hundred gas fields within its borders. The means employed do not exceed legitimate bounds, and seek the accomplishment of lawful ends, the protection of property rights and the prevention of the waste of the natural resources of the State. As the actions of the agencies of the State tend to accomplish both such ends they must be sustained.

It is prayed that the decision below be reversed.

Respectfully submitted,

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APPENDIX "A"

HOUSE BILL NO. 266

"Section 1. Declaration of policy: In recognition of past, present, and imminent evils occurring in the production and use of natural gas, as a result of waste in the production and use thereof in the absence of correlative opportunities of owners of gas in a common reservoir to produce and use the same, this law is enacted for the protection of public and private interests against such evils by prohibiting waste and compelling ratable production.

"Article 6008 of the Revised Civil Statutes of Texas of 1925 as amended by Chapter 26, Acts of the First Called Session of the Forty-second Legislature, as amended by Chapter 100, Acts of the Regular Session of the Forty-third Legislature, as amended by Chapter 88, Acts of the First Called Session of the Forty-third Legislature, is hereby amended so as to hereafter read as follows:

Sec. 2. Unless the context otherwise requires, the words defined in this Section shall have the following meaning when used in this Article to-wit:

"(a) 'Commission' means the Railroad Commission of Texas;

"(b) 'Person' means any natural person, corporation, association, partnership, receiver, trustee, guardian, executor, administrator and a fiduciary or representative of any kind;

"(c) The term 'Common Reservoir' as used in this Article shall mean any oil and/or gas field or part thereof which comprises and includes any

area which is underlaid, or which from geological or other scientific data or experiments or from drilling operations or other evidence appears to be underlaid by a common pool or accumulation of oil and/or gas;

"(d) The term 'gas well' is any well (a) which produces natural gas not associated or blended with crude petroleum oil at the time of production, or (b) which produces more than one hundred thousand (100,000) cubic feet of natural gas to each barrel of crude petroleum oil from the same producing horizon, or (c) which produces natural gas from a formation or producing horizon productive of gas only encountered in a well bore through which crude petroleum oil also is produced through the inside of another string of casing.

"(e) The term 'oil well' is any well which produces one (1) barrel or more of crude petroleum oil to each one hundred thousand (100,000) cubic feet of natural gas.

"(f) 'Dry Gas' is any natural gas produced from a stratum that does not produce crude petroleum oil.

"(g) The term 'sour gas' shall mean any natural gas containing more than one and one-half (1½) grains of hydrogen sulphide per one hundred (100) cubic feet or more than thirty (30) grains of total sulphur per one hundred (100) cubic feet, or gas which in its natural state is found by the Commission to be unfit for use in generating light or fuel for domestic purposes.

"(h) The term 'sweet gas' shall mean all natural gas except 'sour gas' and 'casinghead gas.'

"(i) The term 'casinghead gas' shall mean

any gas and/or vapor indigenous to an oil stratum and produced from such stratum with oil.

"(j) The term 'natural gasoline' shall apply to gasoline manufactured from casinghead gas or from any natural gas.

"(k) For the purposes of this Article, by the term 'cubic foot of gas' is meant volume of gas expressed in cubic feet and computed at a base pressure of four (4) ounces per square inch above the average barometric pressure of 14.4 pounds per square inch, a standard base and flowing temperature of sixty (60) degrees Fahrenheit; correction to be made for pressure according to Boyle's Law, and for specific gravity according to test made by the Balance Method.

"Sec. 3. The production, transportation, or use of natural gas in such manner, in such amount, or under such conditions as to constitute waste is hereby declared to be unlawful and is prohibited. The term 'waste' among other things shall specifically include:

"(a) The operation of any oil well, or wells with an inefficient gas-oil ratio.

"(b) The drownng with water of any stratum or part thereof capable of producing gas in paying quantities.

"(c) Underground waste or loss however caused and whether or not defined in other subdivisions hereof.

"(d) Permitting any natural gas well to burn wastefully.

"(e) The creation of unnecessary fire hazards.

"(f) Physical waste or loss incident to, or re-

sulting from, so drilling, equipping, or operating well or wells as to reduce or tend to reduce the ultimate recovery of natural gas from any pool.

"(g) The escape into the open air, from a well producing both oil and gas, of natural gas in excess of the amount which is necessary in the efficient drilling or operation of the well.

"(h) The production of natural gas in excess of transportaton or market facilities, or reasonable market demand for the type of gas produced.

"(i) The use of natural gas for the manufac ture of carbon black without first having extracted the natural gasoline content from such gas.

"(j) The use of sweet gas produced from a gas well for the manufacture of carbon black.

"(k) Permitting any natural gas produced from a gas well to escape into the air before or after such gas has been processed for its gasoline content.

"(l) The production of natural gas from a well producing oil from a stratum other than that in which the oil is found, unless such gas is produced in a separate string of casing from that in which the oil is produced.

"(m) The production of more than one hundred thousand (100,000) cubic feet of gas to each barrel of crude petroleum oil unless such gas is put to one or more of the uses authorized for the type of such gas so produced under allocations made by the Commission.

"Sec. 4. (a) If oil and/or gas be produced through different strings of casing set in the same

well bore, the inner string through which oil and/or gas be produced shall be regarded as one well, and each successive additional string of casing through which oil and/or gas shall be produced, from a different producing horizon, the others producing through the same well bore, shall be regarded as another well.

"(b) No person in possession of or operating any oil well shall produce from such well natural gas found in a horizon productive of natural gas only.

"Sec. 5. The Commission is given authority to fix and determine the gas-oil ratio of all oil wells in this State, but nothing in this Act shall be construed to authorize the limitation of the production of marginal wells as such marginal wells are defined, below the amount fixed by statute. If any restriction imposed by the Commission upon the production of oil from any oil well operates to increase the gas-oil ratio of such well so as to then classify it as a gas well under the provisions of this Article, such well shall be deemed to be an oil well nevertheless.

"Sec. 6. The Commission shall make and enforce rules, regulations, or orders for the conservation of natural gas, to prevent the waste thereof, and otherwise to accomplish the purposes of this Article, including rules, regulations, or orders for the following purposes:

"(1) To prevent the waste, as hereinbefore defined, of natural gas in drilling and producing operations and in the piping and distribution thereof.

"(2) To require dry or abandoned wells to be plugged in such way as to confine natural gas, and water in the strata in which they are found

and to prevent them from escaping into other strata.

"(3) For the drilling of wells and preserving a record thereof.

"(4) To require wells to be drilled and operated in such manner as to prevent injury to adjoining property.

"(5) To prevent natural gas and water from escaping from the strata in which they are found into other strata.

"(6) To require records to be kept and reports made.

"(7) To provide for the issuance of permits and other evidences of permission when the issuance of such permits, or permission is necessary or incident to the enforcement of its blanket grant of authority to make any rules necessary to effectuate the law.

"Sec. 7. After the expiration of ten (10) days from the time of encountering gas in a gas well, no gas from such well shall be permitted to escape into the air, and all gas produced therefrom shall be utilized for the following purposes:

"(1) No sweet gas shall be utilized except for:

(a) Light or fuel.

"(b) Efficient chemical manufacturing, other than the manufacture of carbon black.

"(c) Bona fide introduction of gas into oil, or gas bearing horizon, in order to maintain or increase the rock pressure or otherwise increase the ultimate recovery of oil or gas from such horizon.

"(d) The extraction of natural gasoline therefrom when the residue is returned to the horizon from which it is produced.

"(2) In addition to the purposes for which sweet gas produced from a gas well may be used, sour gas may be used for efficient chemical manufacturing purposes including the manufacture of carbon black provided it is utilized in a plant producing a recovery of not less than one (1) pound of carbon black to each one thousand (1000) cubic feet of gas, and provided further that the gasoline content is removed and saved from such sour gas before the same is utilized for carbon black.

"(3) Casinghead gas may be used for any beneficial purpose, which includes the manufacture of natural gasoline.

"(4) Any producer of either sweet or sour gas or casinghead gas may use the same as gas lift in the bona fide production of oil where such gas is not used in excess of ten thousand (10,000) cubic feet per barrel of oil produced; provided that in order to prevent waste in any case where the facts in such case warrant it, the Commission may permit the use of additional quantities of gas to lift oil, provided all such gas so used in excess of ten thousand (10,000) cubic feet for each barrel of oil shall be processed for natural gasoline and the residue burned for carbon black when same is reproduced.

"Sec. 8. It shall be the duty of all persons, companies or corporations producing natural gas from any gas well to ascertain and determine during the months of January, and July, respectively, of each year hereafter, through appropriate tests, to be made in the presence of and under the supervi-

sion of a representative of the Commission, and under uniform and generally recognized methods, and under regulations which shall be prescribed by the Commission, the open flow and rock pressure of each gas well from which natural gas shall be produced, and verified reports thereof shall be filed with the Commission on or before the tenth day of each of the months aforesaid; which said reports shall be kept on file with the Commission and shall become a permanent public record and shall be open to the inspection and examination of the public, and which said reports shall disclose the name of the representative of the Commission who was actually present when such tests were made. If any person producing gas from the same common reservoir be dissatisfied with the test as made and reported, such person may demand a second test to be made in the manner herein provided and in the presence of such person or his representative.

"Sec. 9. The Railroad Commission shall require one of its duly authorized agents to inspect, read or test any meter, or meters, through which natural gas is being measured, or guaged, upon the request of any lessor, lessee, operator, or royalty owner from whose land, lease, or royalty interest natural gas is being produced.

"Sec. 10. It shall be the duty of the Commission to prorate and regulate the daily gas well production from each common reservoir in the manner and method herein set forth. The Commission shall prorate and regulate such production for the protection of public and private interests:

"(a) In the prevention of waste as 'waste' is defined herein.

"(b) In the adjustment of correlative rights and opportunities of each owner of gas in a common reservoir to produce and use or sell such gas as permitted in this Article.

"Sec. 11. The Commission shall exercise the authority to accomplish the purpose designated under item (a) of Section 10 when the presence or imminence of waste is supported by a finding based upon the evidence introduced at a hearing to be held as herein provided.

"The Commission shall exercise the authority to accomplish the purpose designated under item (b) of Section 10 when evidence introduced at a hearing to be held as herein provided will support a finding made by the Commission that the aggregate lawful volume of the open flow or daily potential capacity to produce of all gas wells located in a common reservoir, is in excess of the daily reasonable market demand for gas from gas wells that may be produced from such common reservoir, to be utilized as permitted in this Article.

"Sec. 12. On or before the twentieth (20th) day of each calendar month the Commission shall hold a hearing after notice has been given, as proided by law, for the purpose of determining the aggregate capacity to produce of all gas wells in a common reservoir, and as nearly as possible, the daily volume of gas from each common reservoir that will be produced from gas wells during the following month to be utilized as permitted in this Article. Upon such determination, the Commission based upon evidence introduced at such hearing, shall allocate to each gas well producing gas from such common reservoir a percentage of

the daily productive capacity of each well which may be produced daily during the following month from each gas well producing gas from such common reservoir. Such percentage of the daily producing capacity of each well shall be regarded as its daily allowable production of such daily volume required for utilization from such common reservoir. The daily allowable production of each gas well shall be computed and allocated as provided in Sections 13 and 14.

"Sec. 13. In determining the daily allowable production for each gas well the Commission shall take into account the size of the tract segregated with respect to surface position and common ownership upon which such gas well or wells are located; the relation between the daily producing capacity of each gas well and the aggregate daily capacity of all gas wells producing the same kind of gas in the same common reservoir or zone; and all other factors which are pertinent; provided that the Commission shall not take into account the size of the tract upon which any gas well or wells are located in excess of the efficient drainage area of such well or wells, producing at twenty-five per cent (25%) of the daily productive capacity, which drainage area shall be determined by the Commission. In ascertaining the drainage area of a well, the Commission shall take into account such factors as are reflected in the productive capacity of a gas well, including formation pressure, the permeability and porosity of the producing formation, and the well bore's structural position, together with all other factors taken into account by a reasonably prudent operator in determining the drainage area for a gas well.

"Sec. 14. It shall be the duty of the Commission, after notice and hearing, to ascertain and de-

termine the reasonable market demand for gas from gas wells to be used for light and fuel purposes and for all other lawful purposes to which sweet gas may be put under the terms of this Article and by proper order to restrict the production of gas from all gas wells in said field producing such gas to an amount equal to market demand or to an amount which may be produced without waste as otherwise defined; provided, however, the production of such gas shall in any event be restricted to the amount of the reasonable market demand therefor. In such order the Commission shall allocate, distribute or apportion the total allowable production from such field among the various gas wells affected by the order on a reasonable basis, and as provided in Section 13. It shall likewise be the duty of the Commission to prorate the daily gas well production of sour gas produced from each common reservoir of sour gas in this State. The hearing for such purpose shall be held at the same time as the hearing pertaining to the proration of sweet gas well production. The proration of sour gas well production shall be accomplished according to the manner and method herein provided for the proration of sweet gas well production.

"Sec. 15. Nothing contained in this Article shall require that the production from any gas well with a daily natural open flow of two hundred thousand (200,000) cubic feet of natural gas or more to be restricted to a quantity less than fifty thousand (50,000) cubic feet of natural gas daily; and nothing herein shall require that the production from any gas well with a daily natural open flow of less than two hundred thousand (200,000) cubic feet of gas be reduced to a quan-

tity less than twenty-five per cent (25%) of its natural open flow.

"In all common reservoirs producing both sweet and sour gas, no gas well shall be permitted to produce in excess of twenty-five per cent (25%) of its daily productive capacity; provided the Commission, upon a finding that reservoir conditions require that such percentage be increased to prevent waste, and that such increase will not create a drainage condition as between sweet and sour gas lands, may authorize an increase in such allowable production. Where the allowable production theretofore allocated to any well is more than fifteen per cent (15%) of its daily producing capacity, and the Commission finds that the production of its daily allowable from such well will cause waste due to the interminging of sweet and sour gas, the Commission may order the production from such well restricted to fifteen per cent (15%) of its daily producing capacity, but this sentence shall not be construed to militate against the right of the Commission to fix the allowable production of any well below fifteen per cent (15%) of its daily producing capacity in carrying out the requirements of Sections 13 and 14 of this Act.

"Sec. 16. It shall be unlawful for any person to produce gas from a gas well as herein defined in excess of the daily allowable production in such schedule of allowable production. The rate of production from any gas well shall be deemed to be the average daily rate of production for the month.

"Sec. 17. Where gas is produced from one stratum and oil and gas is produced from another stratum in the same well bore, the Commission

shall take into account the amount of gas produced from the oil stratum in determining the amount of gas that may be produced from the stratum producing gas only and may subtract the amount of the casinghead gas produced from the dry gas that would be allocated to said well if it produced dry gas and may restrict the dry gas production accordingly.

"Sec. 18. When unforseen contingencies increase the demand for gas required by any distributor, transporter or pruchaser to an amount in excess of the total allowable production of the wells to which he is connected, such distributor, transporter or purchaser is authorized to increase his take ratably from all such wells in order to supply his demand for gas, provided, however, that notice of such increase and the amount thereof shall be given to the Commission within five (5) days; and provided further that the Commission, at its next hearing, shall adjust the inequality of withdrawals caused by such increase in fixing the allowable production of the various wells in the common reservoir or zone.

"Sec. 19. If the Commission finds upon consideration of the evidence introduced at a hearing that either or both of the purposes designated under Section 10 of this Article may be more adequately accomplished by zoning a common reservoir, the Commission shall zone such common reservoir. If the Commission zones such common reservoir, each zone shall be regarded as a separate common reservoir in making allocations of daily allowable production as provided in this Article. The Commission shall allocate to each zone its just proportion of the market demand for gas from the common reservoir, and shall estab-

lish appropriate rules and regulations applicable to each zone and shall have the right to adjust its orders to the practicable conditions which exist and to enter any reasonable order which is necessary to effectuate the purpose of this law. The Commission is expressly authorized to segregate a sour gas area from a sweet gas area and shall not be required to restrict the allowable production of the sour gas zone to the same percentages that may be produced from the sweet gas zone.

"Sec. 20. In the event the Commission finds that the owner of any gas well has failed or refused to utilize or sell the allowable production from his well when such owner has been offered a connection or market for such gas at a reasonable price, such well shall be excluded from consideration in allocating the daily allowable production from the reservoir or zone in which same is located until the owner thereof signifies to the Commission his desire to utilize or sell such gas. In all other cases all gas wells shall be taken into account in allocating the allowable production among wells producing the same type of gas.

"Sec. 21. In order that land owners and operators that have undeveloped land within a proven natural gas field may secure a market for their natural gas, and in order that the market for natural gas may be more equitably distributed among the various land owners and operators, and in the interest of the conservation and development of natural gas, it is declared to be lawful for any two or more lessors, leessees, operators, or other persons, firms, or corporations owning or controlling production, leases, royalties or other interest in the separate properties of the same producing gas field, with the approval of the Attorney General of

Texas, to enter into agreements for the purpose of bringing about cooperative development and/or operation of all or a part or parts of such field, or for the purpose of fixing the time, location and manner of drilling and operating wells for the production, storage, marketing or the repressuring of gas, or for the purpose of the equitable distribution of royalty payments. Any such agreement shall bind only the parties thereto, and their successors and assigns of such having knowledge or notice thereof, and shall be enforceable in an action for specific performance.

"Sec. 22. The Commission shall be vested with a broad discretion in administering this law, and to that end shall be authorized to adopt any and all rules, regulations or orders which it finds are necessary to effectuate the provisions and purposes of said law.

"Sec. 23. Any person violating any of the provisions of this Article shall be liable to a penalty not to exceed One Thousand Dollars ($1,000) for each offense, and each day's violation shall be a separate offense. Such penalty may be recovered by the State of Texas with the cost of suit in a civil action instituted in Travis County or in the County where the violation occurred by the Attorney General or by the County or District Attorney when joined by the Attorney General of Texas; and any and all violations or threatened violations of this Article may be enjoined by any Court of competent jurisdiction in which the suit for penalty may be brought, and in such cases the Court may issue such writs of injunction, mandatory or prohibitory, as the facts justify.

"Sec. 24. Any person may appeal for judicial review from any rule, order, or regulation of the

Commission made and promulgated under the authority conferred by this Article in the same manner, upon the same conditions and to the same court or courts as prescribed in this Chapter for appeals from other rules, regulations or orders of the Commission, promulgated under the general Oil Conservation Statutes of this State.

"Sec. 25. All laws or parts of laws in conflict with any of the provisions of this Act are hereby expressly repealed; provided that on account of the absence of pipe lines necessary to accomplish transportation of gas to carbon black plants from many areas producing sour gas in one or more of the common reservoirs of this State and in as much as many wells producing sweet gas are without market outlet for gas used as light and fuel which will require considerable time to make connection after hearing to determine the allowable production, it is provided that gas from a well producing sour gas only may be utilized as provided in said Article 6008 of the Revised Civil Statutes of 1925 as amended by Acts of the First Called Session of the Forty-second Legislature, as amended by Acts of the Regular Session of the Forty-third Legislature as aforesaid, until October 1, 1935, and the gas from a well producing sweet gas may be utilized as authorized under said Act as amended until August 1, 1935, at which time this Article shall be effective as to sweet gas wells; provided, however, that nothing in this Act contained shall repeal, modify or impair any of the provisions of House Bill No. 782, relating to oil and gas conservation, enacted at this session of the Legislature, or shall impair the power of the Commission, proceeding under the oil and gas conservation laws of this State, to prevent waste.

"Sec. 26. If any section or sections, clause sen-

tence or provision of this Article should, for any reason, be held to be invalid or unconstitutional, it shall not affect in anywise the remaining parts of this Article, not so held, and all that portion not held invalid shall remain in full force and effect.

"Sec. 27. The presence and imminence of evils occurring in the production and use of natural gas as a result of the waste in the production and use thereof in the absence of correlative opportunities of owners of gas in the common reservoirs of this State to produce and use the same, have created an emergency and imperative public necessity demanding the suspension of the Constitutional Rule requiring Bills to be read on three separate days in each House, and said Rule is hereby suspended, and this Act shall take effect from and after its passage, and it is so enacted."

APPENDIX "B"

"Art. 6008.

Any person, co-partnership, or corporation in possession, either as owner, lessee, agent or manager, of any well producing natural gas, in order to prevent the said gas from wasting by escape, shall within ten days after penetrating the gas bearing rock in any well, shut in and confine the gas in said well until and during such time as the gas therein shall be utilized for light or fuel or power; provided, that this shall not apply to any well that is operated for oil. Any person violating the provisions of this article shall be liable to a penalty of not less than three hundred dollars for each offiense, to be recovered with the costs of suit in a civil action in the name of the State of Texas, in the county in

Commission made and promulgated under the authority conferred by this Article in the same manner, upon the same conditions and to the same court or courts as prescribed in this Chapter for appeals from other rules, regulations or orders of the Commission, promulgated under the general Oil Conservation Statutes of this State.

"Sec. 25. All laws or parts of laws in conflict with any of the provisions of this Act are hereby expressly repealed; provided that on account of the absence of pipe lines necessary to accomplish transportation of gas to carbon black plants from many areas producing sour gas in one or more of the common reservoirs of this State and in as much as many wells producing sweet gas are without market outlet for gas used as light and fuel which will require considerable time to make connection after hearing to determine the allowable production, it is provided that gas from a well producing sour gas only may be utilized as provided in said Article 6008 of the Revised Civil Statutes of 1925 as amended by Acts of the First Called Session of the Forty-second Legislature, as amended by Acts of the Regular Session of the Forty-third Legislature as aforesaid, until October 1, 1935, and the gas from a well producing sweet gas may be utilized as authorized under said Act as amended until August 1, 1935, at which time this Article shall be effective as to sweet gas wells; provided, however, that nothing in this Act contained shall repeal, modify or impair any of the provisions of House Bill No. 782, relating to oil and gas conservation, enacted at this session of the Legislature, or shall impair the power of the Commission, proceeding under the oil and gas conservation laws of this State, to prevent waste.

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which the act shall be committed or omitted. Each day such violation continues shall be a separate offense. Such suit may be brought at the instance of any resident of this State without security or liability of cost." (Acts 1913, p. 212).

APPENDIX "C"

"Article 6008. Any party or person in possession as owner, lessee, agent, trustee, receiver, or manager, or any person, co-partnership, or corporation in possesion of any well producing natural gas only, in order to prevent said gas from wasting by escape, shall, within ten (10) days after encountering such gas, confine said gas in said gas well until said gas shall be utilized for light or fuel; provided, however, the Commission may permit the use of such gas for the purpose of being introduced into an oil or gas bearing stratum in order to maintain or increase the rock pressure, or otherwise increase the ultimate recovery of oil or gas from such stratum, and for any other purpose which, under circumstances surrounding each particular case, might be found by the Commission, after hearing, to be practical and conducive to the public welfare. Any person violating the provisions of this Article shall be liable to a penalty of one Thousand Dollars ($1,000) for each offense to be recovered with the cost of suit in a civil action in the name of the State of Texas, in Travis County, and each day any such violation continues shall be a separate offense, and for which the party in violation shall be held liable for the penalty herein prescribed." (Act 1931, 42nd Legislature, 1st Called Session, Ch. 26, p 46.)

APPENDIX "D"

"Article 6008. Any person, firm or corporation in possession as owner, lessee, agent, trustee, receiver, or manager, or any person, co-partnership, or corporation in possession of any well producing natural gas only, in order to prevent said gas from wasting by escaping, shall within ten (10) days after encountering such gas, confine said gas in said well until said gas shall be utilized for light or fuel; provided, that in all common reservoirs or pools consisting of more than three hundred thousand (300,000) acres where gas is encountered for which there is no reasonable market for light or fuel available to the owner, the same may be utilized for other purposes, including the manufacture of natural gasoline, to the extent of twenty-five (25) per cent of the open flow of the well producing such gas, and under such circumstances, such utilization for purposes other than light and fuel shall not constitute waste; and provided further that the Commission may permit the use of gas from any well producing natural gas only for the purpose of being introduced into an oil or gas bearing stratum in order to maintain or increase the rock pressure or otherwise increase the ultimate recovery of oil or gas from such stratum and for any other purpose which under circumstances surrounding each particular case might be found by the Commission after hearing to be practical and conducive to the public welfare. Any person violating the provisions of this Article shall be liable to a penalty of One Thousand Dollars ($1,000.00)

for each day such offense is committed, to be recovered with the costs of suit in a civil action instituted by the Attorney General in the name of the State of Texas in Travis County, and each day any such violation continues, shall be a separate and distinct offense and for which the party in violation shall be held liable for the penalty herein prescribed." (Acts 1933, 43rd Legislature, 1st Called Session, Ch. 88, p. 229)